Supreme Court, U.S.
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No. 95-

In the
Supreme Court of the United States
October Term, 1995

RAYTECH CORPORATION,

Petitioner,

v.

EARL WHITE, YVONNE WHITE, PASQUALE DICINTIO, MARIE DICINTIO, LARRY BENZIE, EXECUTOR OF THE ESTATE OF EDWARD BENZIE, EUGENE KLINGENBERGER, MARGIE KLINGENBERGER, JOHN DOE, and all others similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented for Review

1. Whether, by relying on a prior District of Oregon judgment founded on Oregon successor liability law to preclude petitioner's litigation of the same issue under the different successor liability laws of other states, the District of Connecticut and the Third Circuit misapplied the principles of offensive collateral estoppel stated in *Montana v. United States*, 440 U.S. 147 (1979).

2. Whether, by relying on a prior District of Oregon judgment founded on payments that were substantially revised after the date of that judgment and by failing to consider those revised payments on their merits, the District of Connecticut and the Third Circuit misapplied the principles of offensive collateral estoppel stated in *Montana v. United States*, 440 U.S. 147 (1979).

3. Whether, by relying on a prior District of Oregon judgment founded on Oregon policy that public shareholders of an insolvent corporation may not retain the equity of one of the corporation's businesses despite the payment of fair value and the injection of new value, the District of Connecticut and the Third Circuit misapplied the new value exception principles stated in *Case v. Los Angeles Lumber Products, Inc.*, 308 U.S. 106 (1939), and the principles of offensive collateral estoppel stated in *Montana v. United States*, 440 U.S. 147 (1979).

4. Whether, by relying on a prior District of Oregon judgment founded on Oregon policy that transactions are presumed fraudulent when a selling corporation seeks to protect the buyer of corporate assets from seller's liabilities, the District of Connecticut and the Third Circuit misapplied the principles of offensive collateral estoppel stated in *Montana v. United States*, 440 U.S. 147 (1979).

List of Parties

The parties to the proceeding below were:

Petitioner:
Raytech Corporation

Respondents:
Earl White, Yvonne White, Pasquale Dicintio, Marie Dicintio, Larry Benzie, Executor of the Estate of Edward Benzie, Eugene Klingenberger, Margie Klingenberger, John Doe individually and as class representative of all others similarly situated

List of Parent Companies and Non-Wholly-Owned Subsidiaries

Allumatic Products Company

Table of Contents

Questions Presented for Review i

List of Parties ii

List of Parent Companies and Non-Wholly-Owned Subsidiaries ii

Table of Authorities v

Reference to Opinions Delivered in this Case 1

Jurisdiction 1

Constitutional Provisions and Statutes 1

Statement of the Case 2

ARGUMENT 5

I. The Third Circuit's Ruling Conflicts with this Court's Decisions in *Parklane Hosiery* and *Montana* 6

A. The Third Circuit Misapplied this Court's Decisions in Precluding an Issue Governed by Legal Standards that Differ from Oregon's. . . . 9

1. The *Schmoll* court relied on a nontraditional exception under Oregon successor liability law. 10

2. Issue preclusion cannot fairly depend on a judgment based on ambiguous legal standards. 14

B. Use of Offensive Collateral Estoppel to Proliferate Oregon Public Policy of Rejecting the "New Value Exception" Misapplies Not Only *Montana* But Also *Case v. Los Angeles Lumber Products Co.* 15

C. Use of Offensive Collateral Estoppel to Proliferate Oregon's Presumption of Impropriety or Fraud is a Misapplication of *Montana.* 17

D. Use of Offensive Collateral Estoppel When Factual Circumstances Have Changed Substantially is a Misapplication of *Montana* and *Parklane Hosiery.* 19

CONCLUSION 21

TABLE OF AUTHORITIES

CASES

Abramson v. Pennwood Investment Corp., 392 F.2d 759 (2d Cir. 1968) 14

In re Acushnet River & New Bedford Harbor, 712 F. Supp. 1010 (D. Mass. 1989) 13

Belcher v. Tarbox, 486 F.2d 1087 (9th Cir. 1973) 18

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) 8, 9

Board of County Supervisors v. Scottish & York Insurance Service, Inc., 763 F.2d 176 (4th Cir. 1985) 14

In re Bonner Mall Partnership, 2 F.3d 899 (9th Cir 1993), cert. granted, 114 S. Ct. 681, dismissed as moot, 115 S. Ct. 386 (1994) 16

Case v. Los Angeles Lumber Products Co., 308 U.S. 106 . . . . . 5, 16, 17

Chandler v. City of Dallas, 958 F.2d 85 (5th Cir. 1992) 18

Dairy Co-op. Association v. Brandes Creamery, 30 P.2d 338 (Or. 1934) 11

Electro-Miniatures Corp. v. Wendon Co.,
889 F.2d 41 (3d Cir. 1985) 8

Erickson v. Grande Ronde Lumber Co.,
92 P.2d 170 (Or. 1939) 11

Fay v. South Colonie Central School District,
802 F.2d 21 (2d Cir. 1986) 14

Grogan v. Garner, 498 U.S. 279 (1991) 13

Heisler v. Woodruff, 327 U.S. 726 (1946) 8

Jack Faucett Associates, Inc. v. American Telegraph & Tel. Co., 744 F.2d 118 (D.C. Cir. 1984), cert denied, 469 U.S. 1196 (1985) 9

James Talcott, Inc. v. Allahabad Bank, Ltd.,
444 F.2d 451 (5th Cir.), cert. denied,
404 U.S. 940 (1971) 9

Leighton v. One William St. Fund, Inc.,
343 F.2d 565 (2d Cir. 1965) 18

Long v. Home Health Services of Puget Sound,
719 P.2d 176 (Wash. App. 1986) 18

Magna Weld Sales Co. v. Magna Alloys & Research Pty. Ltd., 545 F.2d 668
(9th Cir. 1976) 18

Montana v. United States,
440 U.S. 147 (1979) . . . . . passim

Musikiwamba v. ESSI, Inc., 760 F.2d 740
(7th Cir. 1985) 12

Norwest Bank v. Ahlers, 485 U.S. 197 (1988) 16

Orlando Light Bulb Service, Inc. v. Laser Lighting & Electric Supply, Inc.,
523 So. 2d 740 (Fla. App. 1988) 18

Parklane Hosiery Co. v. Shore,
439 U.S. 322 (1979) 6, 10

Peterson v. Harville, 445 F. Supp. 16
(D. Or. 1977), aff'd, 623 F.2d 611 (9th Cir. 1980) 18

Ray v. Alad Corp., 560 P.2d 3 (Cal. 1977) 18

Raytech Corp. v. White,
54 F.3d 187 (3d Cir. 1995) . . . . . passim

Raytech Corp. v. White,
Civ. No. B-89-623 (D. Conn. Aug. 28, 1991),
aff'd, 54 F.3d 187
(3d Cir. 1995) 1, 4

In re Real Estate Title & Settlement Services Antitrust Litigation, 869 F.2d 760 (3d Cir. 1989),
cert denied, 493 U.S. 821 (1989) 14

Russell v. Place, 94 U.S. 606 (1876) 13, 14

Schmoll v. ACandS, Inc., 703 F. Supp. 868
(D. Or. 1988), aff'd, 977 F.2d 499
(9th Cir. 1992) . . . . . passim

Schmoll v. ACandS, Inc., 977 F.2d 499 (9th Cir. 1992) 1, 4, 12, 14, 15

Wattleton v. International Brotherhood of Boiler Makers, 686 F.2d 586 (7th Cir. 1982), cert. denied, 459 U.S. 1208 (1983) 18

STATUTES

28 U.S.C. § 1254(1) 1, 5

28 U.S.C. § 1332 2

28 U.S.C. § 1334 . . . . . 2, 8

28 U.S.C. § 1412 4

Fed. R. Civ. P. 52(a) 18

OTHER REFERENCES

15 William M. Fletcher, Cyclopedia of Law of Private Corporations (perm. ed. 1990) 10

Reference to Opinions Delivered in this Case

Raytech Corp. v. White, 54 F.3d 187 (3d Cir. 1995) (reproduced in Petitioners' Appendix ("App.") at App. 1).

Raytech Corp. v. White, Civ. No. B-89-623, slip op. (D. Conn. Aug. 28, 1991) (App. 18), *aff'd*, 54 F.3d 187 (3d Cir. 1995).

Raytech Corp. v. White, Civ. No. B-89-623, slip op. (D. Conn. Feb. 20, 1992) (Ruling on Motion for Reconsideration) (App. 53).

Schmoll v. ACandS, Inc., 977 F.2d 499 (9th Cir. 1992) (App. 55).

Schmoll v. ACandS, Inc., 703 F. Supp. 868 (D. Or. 1988) (App. 57), *aff'd*, 977 F.2d 499 (9th Cir. 1992).

Jurisdiction

Judgment entered on May 10, 1995. Jurisdiction for review by writ of certiorari is conferred by 28 U.S.C. § 1254(1).

Constitutional Provisions and Statutes

No constitutional provisions, statutes or regulations are involved in the case.

Statement of the Case

Federal jurisdiction for this action in the first instance was provided by 28 U.S.C. § 1334 as a case arising under the Bankruptcy Code, title 11. Petitioner also asserted diversity jurisdiction under 28 U.S.C. § 1332. Complaint ¶ 2 (June 14, 1989).

In *Raytech Corp. v. White*, 54 F.3d 187 (3d Cir. 1995), the Third Circuit affirmed the district court's application of offensive collateral estoppel to hold Raytech Corporation liable as a successor for the strict liability torts of Raymark Industries, Inc. Raytech had brought the declaratory judgment action, seeking a ruling of nonliability and class certification in connection with Raytech's Chapter 11 bankruptcy reorganization. In an unpublished decision (App. 53), the United States District Court for the District of Connecticut (Daly, J.), having withdrawn its reference to the Bankruptcy Court, held that Raytech was precluded from relitigating its liability as a successor as a result of a decision under Oregon law in *Schmoll v. ACandS, Inc.*, 703 F. Supp. 868 (D. Or. 1988), *aff'd*, 977 F.2d 499 (9th Cir. 1992).

Raymark was and remains saddled with tort claims exceeding $33 billion flowing from its manufacture of asbestos-containing products. *White*, 54 F.3d at 189; *Schmoll*, 703 F. Supp. at 873. From 1981 to 1985, Raymark's net worth had shrunk from $112.4 million to $3.6 million. *White*, 54 F.3d at 189. In addition to its asbestos-related businesses, Raymark owned two potentially profitable subsidiary businesses with no independent connection to the asbestos litigation. *Schmoll*, 703 F. Supp. at 872. Raymark resolved in 1985 to restructure its operations to achieve three long term goals:

1. to protect and enhance shareholder investment;

2. to maximize the amounts available for deserving asbestos-injured claimants; and

3. to limit exposure for asbestos claims only to businesses currently threatened, thus enabling its other businesses to grow, unshadowed by the cloud of asbestos liability.

Id. at 873-74. Raymark concluded that these goals could be responsibly achieved by transferring the non-asbestos businesses to a related corporate entity, *provided* fair value was paid for the assets transferred. *See id.* at 869, 873.

Through a triangular merger, Raymark formed the petitioner, Raytech Corporation, whose owners were the public shareholders of Raymark. *Id.* at 869-70. In 1987, Raytech completed the transaction by purchasing the Raymark businesses for a combination of approximately $15 million in cash, plus stock and unsecured notes. *Id.* at 871. The notes were current when the District of Oregon first visited the issue in 1988, and they remain current seven years later. *White*, 54 F.3d at 193. To date Raytech has paid Raymark more than $63 million in cash toward the original purchase price for the Raymark assets. *Id.*

Following the sale, Raytech was named in several actions seeking to impose liability on Raytech as a successor to Raymark's asbestos-related liabilities. One of those cases, *Schmoll v. ACandS, Inc.*, 703 F. Supp. 868 (D. Or. 1988), was tried in the United States District Court for the District of Oregon (Panner, C.J.). On December 23, 1988, then-Chief Judge Panner ruled that Raytech was liable as a successor for Raymark's asbestos-related strict tort liability.

Id. at 875. Judge Panner made no finding of fraud in the transaction nor did he find that Raytech had failed to pay fair value for the businesses it acquired. He noted Raymark's inability to satisfy asbestos-related claims exceeding $33 billion and the likelihood that this type of restructuring might have an unspecified impact on asbestos litigation nationally. *Id.* at 874-75. The Ninth Circuit affirmed on the basis of Judge Panner's decision, noting that, under Oregon law, creditors have priority over shareholders in all of the future earnings of an insolvent corporation. *Schmoll v. ACandS, Inc.*, 977 F.2d 499, 499 (1992). The affirmance made no mention of fraud as a basis for liability. *See id.*

Raytech subsequently filed a petition in the United States Bankruptcy Court for the District of Connecticut under Chapter 11 of the Bankruptcy Code. There, Raytech filed an adversary proceeding seeking a declaration that neither Raytech nor any of its subsidiaries is liable as a successor-in-interest to Raymark. The choice-of-law analysis to determine which state's law applies to the Raymark/Raytech transaction has never been undertaken. *Raytech Corp. v. White*, Civ. No. B-89-623 (D. Conn. Aug. 28, 1991) (App. 18) (hereinafter "*White Ruling*").

The Connecticut District Court (Daly, J.) held that Raytech was precluded from relitigating the issue as a result of the *Schmoll* decision. *White Ruling*, App. at 36-37, 51-52. The court concluded that Judge Panner had implicitly found the transaction to be fraudulent, despite the absence of a specific finding in the *Schmoll* decision. *Id.* at 36 n.15.

The Connecticut District Court subsequently transferred the case to the United States District Court for the Eastern District of Pennsylvania pursuant to 28 U.S.C. § 1412, where Judge Daly's decision was certified for immediate

appeal pursuant to Rule 54(b), Fed. R. Civ. P. The Third Circuit affirmed. *Raytech Corp. v. White*, 54 F.3d 187 (3d Cir. 1995). The Third Circuit held that the standards for offensive collateral estoppel had been met, citing federal cases. This petition follows that ruling.

ARGUMENT

Pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 10.1(c), Raytech petitions for a writ of certiorari to the United States Court of Appeals for the Third Circuit based on that court's decision of an important question of federal issue preclusion law in a way that conflicts with this Court's decisions in *Montana v. United States*, 440 U.S. 147 (1979), and *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106 (1939).

The Oregon district court in *Schmoll* applied ambiguous and rarely litigated standards of Oregon law to rule on a novel but responsibly conducted corporate restructuring. Through that restructuring, Raymark and Raytech sought to address important issues of mass tort liability in a manner that provided fair value from which to satisfy tort claimants but preserved the interests of the public shareholders, including any new value that they would provide.

The *Schmoll* court refused to respect the restructuring based on its findings of intent to protect Raytech from Raymark's liabilities, but the court did not analyze the value given in return. The Connecticut District Court and the Third Circuit have now applied this Oregon public policy, giving creditors absolute priority over shareholders even when new value is given, to all states that might otherwise rule on Raytech's successor liability under their own state laws and policies. The procedural expansion of the uniquely

decided Oregon ruling by the offensive use of issue preclusion in the federal courts has created a crippling presumption of fraudulent purpose behind every restructuring of a corporation facing insolvency, even when the transaction is objectively fair to creditors because of the value given.

Issue preclusion serves to prevent relitigation of identical issues under identical legal standards. *Montana*, 440 U.S. at 155. Use of offensive collateral estoppel to transform local substantive legal standards into national policy is an abuse of the principles underlying *Montana* as well as the fairness requirements of *Parklane Hosiery Co. v. Shore* , 439 U.S. 322, 331 n.16 (1979).

I. The Third Circuit's Ruling Conflicts with this Court's Decisions in *Parklane Hosiery* and *Montana*.

In *White*, the Third Circuit ruled that there was no abuse of discretion in precluding Raytech from litigating whether Raytech was a successor to Raymark's mass tort liabilities. *White*, 54 F.3d at 196. The Third Circuit held that the *Schmoll* court, applying Oregon law, reached the same conclusion on successor liability as would the courts of all other states whose law might apply. *Id.* at 192-93.

The general rule is that a purchaser of assets is not liable to a seller's creditors unless one of several traditionally recognized exceptions apply. Under Oregon law, however, successor liability may be imposed on a buyer of corporate assets under a nontraditional exception reflecting Oregon public policy, even if the buyer has paid fair value, if the court finds that the corporate parties to the transaction intended that the buyer "escape" liability for the seller's prior torts. In *Schmoll*, therefore, the district court applying Oregon law held Raytech liable as a successor to Raymark

without reaching the traditional fact questions of whether Raytech paid Raymark fair value for what was transferred or whether the tort claimants' remedies against Raymark were impaired by the transaction.

Under the substantially different laws of most states, Raytech would be protected from successor liability for Raymark's tort liabilities if Raytech paid fair value for the assets it purchased. In states other than Oregon, payment of fair value is an important factor in whether the buyer may be held liable as a successor to the seller. In those states, the courts are satisfied that creditors are protected if the assets transferred are replaced with cash or assets of value reasonably equivalent to that of the asset sold.[1]

Because Oregon law imposes successor liability despite payment of fair value, Oregon's legal standard differs in substance from the standards in those several other states under whose laws Raytech seeks to have its fair value payment decided. In relying on *Schmoll* to preclude Raytech from litigating fair value under the substantially different laws of states other than Oregon, the Third Circuit violated this Court's rulings which permit offensive collateral estoppel only when the identical issue was actually and necessarily determined by the court in the earlier judgment. *See Montana*, 440 U.S. at 153 (citing *Parklane Hosiery*, 439 U.S. at 326 n.5).

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1 "Fair value" is occasionally formulated as "reasonably equivalent" or "adequate" value for the assets purchased. Each state has its own characterization of the value required to distinguish the fraudulent dispersal of assets for an inadequate price for the purpose of putting assets out of creditors' reach.

A writ of certiorari is warranted because the Third Circuit misapplied the federal law of issue preclusion and, in so doing, failed to observe the *Parklane* and *Montana* requirements that the antecedent case actually have resolved the identical issues sought to be decided below. The identical issues could not have been actually resolved in *Schmoll* because Oregon's successor liability law differs substantially from the laws of other states. It was therefore a misapplication of *Parklane* and *Montana* for the Third Circuit to rule *Schmoll* as universally precluding Raytech from litigating the fair value.

Although there is a split in the circuits as to whether state or federal preclusion standards apply in diversity cases, that issue need not be resolved in this case. The federal rule was in fact applied here despite the official posture of the Third Circuit in, for example, *Electro-Miniatures Corp. v. Wendon Co.*, 889 F.2d 41, 43-44 (3d Cir. 1985) (applying substantive issue preclusion law of State of New Jersey).[2] Moreover, because in this case the court's bankruptcy jurisdiction was properly invoked pursuant to 28 U.S.C. § 1334, the application of federal preclusion principles was independently warranted. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 324 & n.12 (1971); *see Heisler v. Woodruff*, 327 U.S. 726, 733 (1946) (in non-

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2 In the district court's decision underlying the Third Circuit decision, Judge Daly pointed out that the Third Circuit belongs to the minority of circuits holding that state substantive law not federal procedural law governs application of issue preclusion in successive diversity proceedings. *White Ruling*, App. 27. The Third Circuit nevertheless applied federal law throughout its ruling on appeal.

diversity cases, federal courts apply their own rule of res judicata).

A. The Third Circuit Misapplied this Court's Decisions in Precluding an Issue Governed by Legal Standards that Differ from Oregon's.

In *Montana v. United States*, 440 U.S. 147, 155 (1979), this Court held that determining the appropriate application of collateral estoppel or issue preclusion necessitates further inquiry into, first, whether the issues presented by the new litigation are in substance the same as those resolved in the former litigation, second, whether controlling facts or legal principles have changed significantly since the earlier judgment and, third, whether other special circumstances warrant an exception to the normal rules of preclusion. Whether issue preclusion is offensively or defensively applied, it must follow "a fair opportunity procedurally, substantively and evidentially" to pursue the issue in the first instance. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 333 (1971) (internal quotation marks omitted). The required opportunity to litigate an issue is absent when there is "a demonstrable difference in the legal standards" by which the identical historical facts are evaluated. *James Talcott, Inc. v. Allahabad Bank, Ltd.*, 444 F.2d 451, 459 n.8 (5th Cir.), *cert. denied*, 404 U.S. 940 (1971).

Because issue preclusion is an equitable doctrine, fairness is a critical issue in all such decisions. *Jack Faucett Assocs., Inc. v. American Tel. & Tel. Co.*, 744 F.2d 118, 125-26 (D.C. Cir. 1984), *cert denied*, 469 U.S. 1196 (1985). Offensive use of issue preclusion, as in this case, may require "a stronger showing that the prior opportunity to litigate was adequate" than might be required where a litigant

has prevailed in the prior action. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 & n.16 (1979).

Raytech does not seek to defeat the fundamental precepts of judicial finality nor the goals of efficient resolution of disputes by litigating in every jurisdiction. In fact, Raytech brought this declaratory judgment action to permit the issue to be resolved in a single forum after a choice-of-law analysis to determine the law applicable to the successor issue.

1. The *Schmoll* court relied on a nontraditional exception under Oregon successor liability law.

The traditional rule of successor liability has long been that "when a corporation purchases all or most of the assets of another corporation, the purchasing corporation does not assume the debts and liabilities of the selling corporation." *Schmoll*, 703 F. Supp. at 872. The traditional rule and four exceptions are recognized in all states. 15 William M. Fletcher, Cyclopedia of Law of Private Corporations § 7122 (perm. ed. 1990). The exceptions that render a purchasing corporation liable as a successor are when:

a. the purchaser expressly or impliedly assumed the liability;

b. the transaction was a *de facto* merger or consolidation;

c. the purchasing corporation is a "mere continuation" of the selling corporation; or

d. the transaction is entered into fraudulently to evade liability.

Id.

Schmoll is based on a public policy analysis and not on the fourth traditional exception for fraudulently entered transactions. Prior to *Schmoll*, no published Oregon state appellate court decision had discussed successor liability standards since *Erickson v. Grande Ronde Lumber Co.*, 92 P.2d 170 (Or. 1939). *Erickson* recited the four traditional exceptions, including the exception for transactions entered *fraudulently* in order to escape liability. *Id.* at 174. In *Schmoll*, however, Judge Panner intentionally omitted the word "fraudulently" from his findings, despite his citation to *Erickson*. *Schmoll*, 703 F. Supp. at 872. He said he had found no other case like this one.

The *Schmoll* court formulated its own exception as applying when "the corporations enter the transaction to escape liability." *Id.* This formulation of the standard goes beyond the fourth exception traditionally recognized. The *Schmoll* court relied on the 1934 decision in *Dairy Co-op. Ass'n v. Brandes Creamery*, 30 P.2d 338, 341 (Or. 1934), which also omitted reference to "fraud." Judge Panner described the improper character of the *Brandes* transaction, the sole purpose of which was to avoid a contractual liability, *Schmoll*, 703 F. Supp. at 872, but the judge did not describe the theory under which the *Brandes* court found successor liability. The court acknowledged that Raytech's purchase differs from the *Brandes* transaction but pointed to the Oregon policy that flows from *Brandes* of rejecting corporate restructuring carried out to escape liability. *Id.* In effect, the *Schmoll* court relies on older Oregon law that predates the modern discussion of successor liability and uses that

undeveloped principle to forge an entirely different exception for non-fraudulent transactions.

In reaching its decision, the *Schmoll* court examined at length the conditions affecting the asbestos claimants. *Schmoll*, 703 F. Supp. at 873, 874. The court did not, however, fairly examine the impact of the Raytech purchase on those claimants to determine whether they were defrauded (or were intended to be defrauded) in *substance* by the transaction. The claimants cannot be said to have been harmed if the transaction left them (and was intended to leave them) in no worse position than they were in before.[3] *See Musikiwamba v. ESSI, Inc.*, 760 F.2d 740, 751 (7th Cir. 1985) ("Imposing liability on a successor when a predecessor could have provided no relief whatsoever is likely to severely inhibit the reorganization or transfer of assets of a failing business"). Analysis of the true impact of the transaction on claimants could not have been performed, however, without ruling on the fairness of the value that Raytech paid for the Raymark subsidiaries or the effect of the new cash value infused into Raymark in the transaction. By declining to evaluate the Raytech transaction and focusing instead on the social implications of asbestos litigation in Oregon, the *Schmoll* court extended the law of Oregon and departed from traditionally recognized legal standards. The Ninth Circuit in its affirmance confirms that *Schmoll* had nothing to do with fraud, contrary to the gloss applied by the Third Circuit. *See Schmoll*, 977 F.2d at 499.

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3 To the extent that, as a result of the sale, the foundering businesses were converted into more liquid cash, the claimants' position may well have been improved by the transaction.

The *Schmoll* court extended the traditional list of successor liability exceptions by focusing on the form of the transaction, the identities of the shareholders and managers and the need to assert bankruptcy-like controls over corporations burdened with extensive mass tort liabilities. *Schmoll*, 703 F. Supp. at 874. In so doing, the court created under Oregon law a public policy exception to traditional successor liability rules that exists in no other state. *See In re Acushnet River & New Bedford Harbor*, 712 F. Supp. 1010, 1014 (D. Mass. 1989) (*Schmoll* ruling applies to "complex assets transaction . . . undertaken to escape asbestos injury liability even in the absence of fraud").

It is inescapable that Judge Panner was intent on making social policy in *Schmoll*. His concern for the legitimate victims of asbestos injuries is not addressed, however, by preventing a corporate restructuring that does not deprive the claimants of a remedy they had before the transaction. No court ruling can elevate the value of the Raymark assets above their fair market value at the time they were transferred. No ruling can stretch $85.1 million in assets to cover $33 billion in claims. It is enough for successor liability purposes that the transaction did not shrink the available funds.

A legal standard developed in one jurisdiction to cope with a matter of particular social importance to that jurisdiction cannot fairly be applied to impose liability in another jurisdiction that has not adopted the same standard. Under this Court's consistent rulings, issues may be precluded only if the same legal standards used in the first litigation would apply to a later action. *See Grogan v. Garner*, 498 U.S. 279, 285, 290 (1991) (collateral estoppel applied only after finding that identical legal standards applied); *Russell v. Place*, 94 U.S. 606, 608 (1876) ("it must appear, either upon

the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit").

2. Issue preclusion cannot fairly depend on a judgment based on ambiguous legal standards.

Schmoll's reliance on *Brandes*, coupled with its avoidance of the term "fraud," creates an ambiguity that cannot be resolved within the confines of issue preclusion law. On the one hand, Judge Panner's decision has the attributes of a public-policy analysis based on the various legal theories borrowed from *Brandes*, along with the court's concerns for the impossible task of satisfying claimants seeking $33 billion in compensation. The Ninth Circuit affirmance of *Schmoll* adds a note regarding creditors' priority (which would be fully addressed in a fair value determination) but does not attempt to fill the "fraud" gap. *See Schmoll*, 977 F.2d at 499. On the other hand, Judge Daly and the Third Circuit insist that Judge Panner found fraud by implication. *White Ruling*, App. at 36 n.15; *White*, 54 F.3d at 192. In the absence of specificity in the *Schmoll* decision, it is at least as likely that Judge Panner found successor liability under a provision of Oregon law that does not require a finding of fraud.

Ambiguity is no basis for issue preclusion. *Russell v. Place*, 94 U.S. at 608; *In re Real Estate Title & Settlement Servs. Antitrust Litigation*, 869 F.2d 760, 764 n.1 (3d Cir. 1989), *cert denied*, 493 U.S. 821 (1989); *Fay v. South Colonie Cent. School Dist.*, 802 F.2d 21, 30 (2d Cir. 1986); *Board of County Supervisors v. Scottish & York Ins. Serv., Inc.*, 763 F.2d 176, 179 (4th Cir. 1985); *Abramson v. Pennwood Inv. Corp.*, 392 F.2d 759, 762 (2d Cir. 1968). Freedom from ambiguity is an inescapable component of the

overall fairness that must characterize the offensive application of issue preclusion. *See Montana*, 440 U.S. at 157 ("question expressly and definitely presented in this suit [must be] the same as that definitely and actually litigated and adjudged" in the predicate action; quoting *United States v. Moser*, 266 U.S. 236, 242 (1924)).

The Connecticut District Court and the Third Circuit concluded that *Schmoll*'s use of the term "improper purpose of escaping liability" was equivalent to fraudulent purpose though not so labeled. The terms "improper purpose", "escaping liability" and "fraudulent purpose" are therefore central to the Third Circuit's conclusion that the same standards were actually applied throughout. In reviewing each court's application of these labels to successor liability law and therefore to federal issue preclusion law, the Court must look to whether the courts of other states would impose successor liability on Raytech for the same underlying factual reasons that *Schmoll* applied. Such an analysis must define the substance of what Raytech did (and intended to do) to incur liability in derogation of the generally agreed rule that no successor liability applies to the good faith purchaser who pays fair value. The ambiguity in this case flows from the Third Circuit's focus on Judge Panner's choice of terms rather than the factual predicates for his ruling.

B. Use of Offensive Collateral Estoppel to Proliferate Oregon Public Policy of Rejecting the "New Value Exception" Misapplies Not Only *Montana* But Also *Case v. Los Angeles Lumber Products Co.*

The Ninth Circuit in affirming *Schmoll* made clear its conviction that Judge Panner was dealing with Oregon's policy regarding the priority to be assigned to public shareholders and creditors in insolvency. *Schmoll*, 977 F.2d at

499. The Ninth Circuit declined the opportunity, which the District of Connecticut and the Third Circuit accepted, to add, "and this transaction was fraudulent." Instead, the Ninth Circuit underscored the policy aspects of *Schmoll*.

The Oregon policy imbedded in *Schmoll* rejects the longstanding "new value" exception to the "absolute priority rule" in *Schmoll's* non-bankruptcy context. The absolute priority rule in bankruptcy proceedings reflects a policy related to the *Schmoll* formulation. This bankruptcy rule "bars old equity from receiving any property via a reorganization plan 'on account of' its prior equitable ownership when all senior claim classes are not paid." *Bonner Mall Partnership v. U.S. Bancorp Mortgage Co. (In re Bonner Mall Partnership*, 2 F.3d 899, 908 (9th Cir. 1993), *cert. granted*, 114 S. Ct. 681, *dismissed as moot*, 115 S. Ct. 386 (1994). The *Bonner Mall* court noted that a corollary to the absolute priority rule permits shareholders stock equity in a reorganized corporation if the shareholders have provided "new value." *Id.* at 907. In so holding, the Ninth Circuit relied on *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106 (1939), and concluded that the new value principles under the pre-Code Bankruptcy Act remain vital. *Bonner Mall*, 2 F.3d at 906-07.

In *Norwest Bank v. Ahlers*, 485 U.S. 197, 203 n.3 (1988), this Court expressly left open the question of the new value exception's continuing vitality under the new Bankruptcy Code. Although this Court granted certiorari in *Bonner Mall*, that case settled and was dismissed as moot before the new value exception could be revisited. *Bonner Mall*, 115 S. Ct 386 (1994). As a result, *Los Angeles Lumber* and the fairness and equitable principles it embodies regarding new value remain the law of the land. *See Los Angeles Lumber*,

308 U.S. at 117-18 (rejecting former rule that excluded shareholder even though new cash was paid).

In this case, the Raytech shareholders did provide new value, including approximately $15 million in cash at the closing. *Schmoll*, 703 F. Supp. at 871. The Oregon policy expressed in *Schmoll* by Judge Panner and the Ninth Circuit affirmance disavowing exception for new value. By misapplying the issue preclusion standards of *Montana v. United States*, however, the District of Connecticut and the Third Circuit have imported the Oregon policy into federal appellate precedent in a way that conflicts with *Los Angeles Lumber*.

Although *Los Angeles Lumber* interpreted the 1934 Bankruptcy Act, its underpinnings of fairness and equity find their bedrock in common law. *See Los Angeles Lumber*, 308 U.S. at 122 ("where the debtor is insolvent, the stockholders's participation must be based on a contribution in money or in money's worth, reasonably equivalent in view of all the circumstances to the participation of the stockholder"). Oregon's election of a different public policy should not be converted to national policy through misapplication of the offensive collateral estoppel principles of *Montana v. United States*.

C. Use of Offensive Collateral Estoppel to Proliferate Oregon's Presumption of Impropriety or Fraud is a Misapplication of *Montana*.

By importing a unique and ambiguous Oregon legal standard into the fabric of successor liability law, the Third Circuit's decision poses a widespread threat to the operations of distressed businesses. Under *Schmoll*, an insolvent corporation not in bankruptcy can no longer rely on its good

faith efforts to reorganize and sell portions of its business in a manner that does not defraud creditors. *Schmoll* holds that the mere intent to protect the buyer of those business assets from the seller's liabilities is impermissible, despite fair value paid. *White* extends the Oregon principle to a national threat. This broad social policymaking function has no place in federal issue preclusion law under established Supreme Court precedent. *See Montana*, 440 U.S. at 155 (special circumstances may warrant an exception to normal rules of issue preclusion).

The general rule is "where a corporation receives in good faith a transfer of assets of another corporation, and pays full consideration, the transfer is not fraudulent." 15 William M. Fletcher, *et al.*, Cyclopedia of Law of Corporations § 7125 at 297; *accord Peterson v. Harville*, 445 F. Supp. 16, 24-25 (D. Or. 1977), *aff'd*, 623 F.2d 611 (9th Cir. 1980); *Long v. Home Health Servs. of Puget Sound*, 719 P.2d 176, 182-83 (Wash. App. 1986); *Orlando Light Bulb Serv., Inc. v. Laser Lighting & Elec. Supply, Inc.*, 523 So. 2d 740, 744 (Fla. App. 1988); *Ray v. Alad Corp.*, 560 P.2d 3, 7 (Cal. 1977). Not only must fraud be explicitly pleaded under Rule 9(b), Fed. R. Civ. P., but explicit and complete factual findings of fraud from the trial court are prerequisite to appellate review. *E.g.*, *Magna Weld Sales Co. v. Magna Alloys & Research Pty. Ltd.*, 545 F.2d 668, 671 (9th Cir. 1976); *Belcher v. Tarbox*, 486 F.2d 1087, 1088 (9th Cir. 1973); *see Fed. R. Civ. P.* 52(a). One of the reasons that Rule 52(a) requires express findings of fact is to ensure the proper application of collateral estoppel. *Chandler v. City of Dallas*, 958 F.2d 85, 88 (5th Cir. 1992); *Wattleton v. International Brotherhood of Boiler Makers*, 686 F.2d 586, 591 (7th Cir. 1982), *cert. denied*, 459 U.S. 1208 (1983); *Leighton v. One William St. Fund, Inc.*, 343 F.2d 565, 567 (2d Cir. 1965). By ruling the Raytech/Raymark transaction "improper" without being

fraudulent, the *Schmoll* court has converted the general rule into a presumption of impropriety.

The *Schmoll* court concluded that the Raymark/Raytech transaction was improper based solely on Raymark's intent to protect Raytech from Raymark's liabilities. Absent fraud or the destruction of creditors' remedies, however, a corporate purpose of protecting buyers of corporate assets from sellers' liabilities is wholly consistent with the general rule. The Oregon policy reverses the general rule by labeling as improper the mere intention to protect buyers. Moreover, by imputing fraud into the *Schmoll* ruling, the District of Connecticut and the Third Circuit have gone a step further and converted the Oregon policy to a general standard that threatens normal corporate transactions nationwide. The transformation of Oregon's presumption of impropriety into fraud and the export of that fraud presumption to the other states is a perversion of this Court's decision in *Montana* that must be corrected.

D. Use of Offensive Collateral Estoppel When Factual Circumstances Have Changed Substantially is a Misapplication of *Montana* and *Parklane Hosiery*.

Schmoll was litigated at a time when the sale of the Raymark subsidiaries was relatively fresh. Raytech was current in its obligation to transfer stock and unsecured notes to Raymark in payment for the subsidiaries it purchased. *White*, 54 F.3d at 195. Judge Panner nevertheless took critical note of the marketability of the stock and unsecured nature of the notes. *Schmoll*, 703 F. Supp. at 873. Without evaluating the stock and notes, Judge Panner characterized Raymark after the transaction as no more than a corporate shell unable to satisfy its asbestos-related obligations. *Id.* at 874. Since Judge Panner's decision, however, Raytech has

met Judge Panner's concerns by paying cash in lieu of the stock transfer originally planned and by paying down the notes. Including the initial cash payments, the original $85.1 million purchase price has been liquidated by $63 million and is continuing to be amortized. *White*, 54 F.3d at 193.

To be internally consistent, the Third Circuit concluded that Raytech's payment of $63 million in honoring its notes given for the purchase of the Raymark subsidiaries was not essential to -- and would not have changed -- Judge Panner's decision. *Id.* at 195. Such a conclusion is logically compelled by the foundation legal ruling that the fairness of the purchase price is irrelevant to the implied fraud finding. This Court's logic in *Montana*, however, requires inquiry not only into the facts essential to the predicate ruling but also into those that must be made by the court in the action sought to be precluded. *See Montana*, 440 U.S. at 159 ("changes in facts essential to a judgment will render collateral estoppel inapplicable in a subsequent action raising the same issues"). Only if the new court would apply the Oregon legal standards can the $63 million payment be fairly said to be irrelevant to a subsequent determination of successor liability.

The Third Circuit agrees that Raytech's paydown of the unsecured notes by $63 million might make a difference if the *Schmoll* court had evaluated the transaction based on the value of the stocks and notes at the time of the transaction. *White*, 54 F.3d at 195. The same is true if, under Oregon law, the *Schmoll* court *should have* judged the fair value of the transaction. Thus, even if the *Schmoll* court (and the Ninth Circuit) erred under Oregon law in failing to judge fair value, that error does not preclude Raytech from litigating the same legal issue based on the changes in the financial underpinnings of the transaction since the *Schmoll* decision. Under any legal standard, Raytech's actual payment of large

amounts of cash must be treated as a substantial change in facts requiring full and fair litigation under *Montana*.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed and the matter remanded for decision on the merits.

Respectfully submitted,

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No. 95-

In the
Supreme Court of the United States
October Term, 1995

RAYTECH CORPORATION,

Petitioner,

v.

EARL WHITE, YVONNE WHITE, PASQUALE DICINTIO, MARIE DICINTIO, LARRY BENZIE, EXECUTOR OF THE ESTATE OF EDWARD BENZIE, EUGENE KLINGENBERGER, MARGIE KLINGENBERGER, JOHN DOE, and all others similarly situated,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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August 8, 1995

TABLE OF CONTENTS

Raytech Corp. v. White, 54 F.3d 187
(3d Cir. 1995) . . . . . App. 1

Raytech Corp. v. White, Civ. No. B-89-623,
slip op. (D. Conn. Aug. 28, 1991),
aff'd, 54 F.3d 187 (3d Cir. 1995) . . . . . App. 18

Raytech Corp. v. White, Civ. No. B-89-623,
slip op. (D. Conn. Feb. 20, 1992) (Ruling on
Motion for Reconsideration) . . . . . App. 53

Schmoll v. ACandS, Inc., 977 F.2d 499
(9th Cir. 1992) . . . . . App. 55

Schmoll v. ACandS, Inc., 703 F. Supp. 868
(D. Or. 1988), *aff'd*, 977 F.2d 499
(9th Cir. 1992) . . . . . App. 57

RAYTECH CORPORATION,

Plaintiff,

v.

EARL WHITE, YVONNE WHITE, PASQUALE DICINTIO, MARIE DICINTIO, LARRY BENZIE, Executor of the Estate of Edward Benzie, EUGENE KLINGENBERGER, MARGIE KLINGENBERGER, JOHN DOE and all others similarly situated,

Defendants.

Creditors' Committee; Oregon Claimants,
(Intervenors in District Court).

No. 94-1347.

United States Court of Appeals
Third Circuit

Argued Nov. 1, 1994.
Decided May 10, 1995.

Before SCIRICA, LEWIS and RONEY,* Circuit Judges.

OPINION OF THE COURT

LEWIS, Circuit Judge.

* Honorable Paul H. Roney, United States Circuit Judge for the Eleventh Circuit Court of Appeals, sitting by designation.

In this case we must determine whether the appellant, Raytech Corporation ("Raytech"), a corporate offspring of Raymark Industries ("Raymark"), is precluded from relitigating the issue of its successor liability for Raymark's asbestos liabilities. We conclude that Raytech is collaterally estopped from relitigating this issue, and will, accordingly, affirm the district court's ruling to this effect.

I. FACTS

Beginning in the early 1970s, Raymark, known at that time as Raybestos- Manhattan, Inc., a manufacturer of asbestos-containing products, was named as the defendant in thousands of personal injury complaints around the country.[1] As a result of this burgeoning asbestos litigation, Raymark suffered a severe financial decline.[2] In response to its financial woes, between 1982 and 1988 Raymark reorganized its corporate structure. Pursuant to this restructuring, Raybestos-Manhattan became Raymark Industries and Raytech, and, significantly, Raytech obtained ownership of Raybestos-Manhattan's two historically lucrative businesses, but without the drain of the asbestos- related litigation.[3]

1 By June 26, 1988, Raymark had been named as a defendant in more than 68,000 cases.

2 In 1981, Raymark had a net worth of $112.4 million. By 1985, the reported net worth had dropped to $3.6 million.

3 The steps in the restructuring are described in graphic detail by the United States District Court for the District of Oregon in *Schnoll v. ACandS, Inc.*, 703 F.Supp. 868, 870-71 (D.Or.1988). We recount these steps here. STEP 1: In 1982, Raybestos-Manhattan changed its name to Raymark Industries and created Raymark Corporation as a holding company for Raymark Industries. Raymark Corporation's only asset was the stock of Raymark Industries. In 1985 Raymark Industries' assets included an operating division, Wet Clutch & Brake, and the stock of a German subsidiary, Raybestos Industrie--- Products G.m.b.H. ("RIPG") STEP 2: In June 1986, Raymark Corporation created Raytech as a wholly owned subsidiary. STEP 3: Raytech then created Raysub as a wholly owned subsidiary. Raytech

In 1988, Raymond Schmoll brought one of the many asbestos-related lawsuits brought against Raymark and Raytech. *See Schmoll v. ACandS, Inc.*, 703 F.Supp. 868 (D.Or.1988). Mr. Schmoll sued Raymark and Raytech in the United States District Court for the District of Oregon, seeking damages for injuries allegedly caused by his inhalation of asbestos dust from products manufactured or sold by the defendants. Schmoll and Raymark/Raytech agreed to submit to the district court the question whether Raytech was a successor in liability to Raymark Industries. Following receipt of

and Raysub were created solely to carry out the merger described in STEP 4. *See Schmoll*, 703 F.Supp. at 870. STEP 4: In October 1986, Raymark Corporation merged into Raysub, with Raymark Corporation surviving as a wholly-owned subsidiary of Raytech. In this merger, each outstanding share of Raymark common stock was converted into one share of Rayteeh stock. Raytech, designated the "holding company," was entirely owned by the former shareholders of Raymark Corporation. As a result of this merger, Raytech, the parent of Raysub, became the parent of Raymark Corporation. Raytech then owned 100 percent of the stock of Raymark Corporation, which owned 100 percent of the stock of Raymark Industries. STEP 5: In 1987, Raytech purchased Raymark Industries' two most profitable assets, the Wet Clutch & Brake Division and the stock of RIPG. Raytech purchased the Wet Clutch & Brake Division for $76 million. Payment consisted of approximately $15 million in cash, $10 million worth of Raytech stock at closing with another $6 million in stock to be transferred later, and $46 million in unsecured notes. The Wet Clutch & Brake Division, the largest of Raymark Industries' business operations, had significant profit potential. Raytech purchased the RIPG stock owned by Raymark Industries for $8.2 million. This sale included a cash payment of $3.9 million, with the balance financed by an unsecured note. Significantly, the asbestos claims against Raymark Industries did not arise from either the Wet Clutch & Brake Division or RIPG. *See id.* at 871 (footnotes omitted). STEP 6: In 1988, Raytech sold Raymark Corporation, and thus Raymark Industries, to Asbestos Litigation Management ("ALM"), a wholly-owned subsidiary of Litigation Control Corporation ("LCC"), whose business includes claims processing, document control and retention, and other services to companies involved in complex litigation, for $1 million. Asbestos Litigation Management paid $50,000 in cash and a $950,000 unsecured promissory note for all Raymark Corporation's assets and liabilities.

extensive briefing on the issue, the district court found that Raytech was a successor in liability to Raymark Industries for Raymark's production, sale and distribution of products containing asbestos, and that Raytech was legally responsible for Raymark's strict liability torts. *Schmoll*, 703 F.Supp. at 875.

In March of 1989, Raytech filed a petition under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Connecticut. Raytech then filed this adversary proceeding seeking a declaratory judgment that it is not liable for the asbestos-related torts of Raymark. At Raytech's behest, the adversary proceeding was transferred to the United States District Court for the District of Connecticut. The district court sought briefing on the question of the preclusive effect of the *Schmoll* decision upon Raytech's declaratory judgment action, and concluded in light of the arguments presented that *Schmoll* collaterally estopped Raytech from relitigating the issue of its successor liability for the asbestos-related torts of Raymark.

The case was then transferred, pursuant to 28 U.S.C. section 1412, to the United States District Court for the Eastern District of Pennsylvania.[4] In early 1994, the district court certified for immediate appeal the Connecticut district court's ruling that Raytech was estopped from denying successor liability.

II.

[1][2] We review for abuse of discretion whether the district court properly applied the doctrine of collateral estoppel. *McLendon v. Continental Can Co.*, 908 F.2d 1171, 1177 (3d Cir.1990) (*citing ParkLane Hosiery Co. v. Shore*, 439 U.S. 322, 331, 99 S.Ct. 645, 651, 58 L.Ed.2d 552 (1979)). Our standard of review is not affected by the fact that this case involves the application of

4 28 U.S.C. § 1412 provides:
A district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties.

offensive collateral estoppel.[5] As the Supreme Court indicated in *ParkLane Hosiery*, the application of *offensive* collateral estoppel is also within the discretion of the trial court. *ParkLane Hosiery*, 439 U.S. at 331, 99 S.Ct. at 651. Therefore, in reviewing the district court's decision to apply offensive collateral estoppel, we are bound by the abuse of discretion standard. *Id.*

[3] Application of collateral estoppel requires consideration of a number of factors. Traditionally, courts have required the presence of four factors before collateral estoppel may be applied: (1) the identical issue was previously adjudicated; (2) the issue was actually litigated; (3) the previous determination was necessary to the decision; and (4) the party being precluded from relitigating the issue was fully represented in the prior action. *United Industrial Workers v. Government of the Virgin Islands*, 987 F.2d 162, 169 (3d Cir.1993). The Supreme Court has also recognized, however, that collateral estoppel is inappropriate if facts essential to the earlier litigated issue have changed. *Montana v. United States*, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979). Finally, in cases

5 Offensive collateral estoppel occurs whenever a plaintiff seeks to estop a defendant from relitigating an issue which the defendant previously litigated and lost against another plaintiff. *ParkLane Hosiery Co. v. Shore*, 439 U.S. 322, 329, 99 S.Ct. 645, 651, 58 L.Ed.2d 552 (1979). In actuality, this case involves, as did *ParkLane Hosiery*, the use of offensive *non-mutual* collateral estoppel. The use of offensive collateral estoppel here is said to be "non-mutual" because Earl White and the other defendants in Raytech's declaratory judgment action--present or future claimants against Raytech--are seeking to bind Raytech to a judgment in a previous case--*Schmoll*--to which they themselves cannot be bound. *See Id.* at 327 n. 7, 99 S.Ct. at 649 n. 7 (stating that it is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard (*citing Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329, 91 S.Ct. 1434, 1443, 28 L.Ed.2d 788 (1971))). For the sake of simplicity we will refer to the operative concept as "offensive collateral estoppel," though it is understood that every reference in this opinion to "offensive collateral estoppel" is actually a reference to "offensive *non-mutual* collateral estoppel."

involving the offensive use of collateral estoppel, the Supreme Court has instructed that courts must take special care to ensure that its application does not work unfairness to party against whom estoppel is asserted.

Of the traditional four factors relevant to collateral estoppel, only one--whether there is an identity of issues--is pressed by Raytech in this appeal. Raytech also contends, however, that facts essential to the *Schmoll* decision have changed, and that the application of offensive collateral estoppel would inflict unfairness upon it. We will address each of these arguments in turn.

A. *Identity of Issues*

[4] Raytech concedes that the only element of the four-part collateral estoppel test at issue in this appeal is whether the issue before the court in *Schmoll* is identical to the issue raised by Raytech in its declaratory judgment action before the district court in Connecticut. To defeat a finding of identity of the issues for preclusion purposes, the difference in the applicable legal standards must be "substantial." *See* 1B *Moore's Federal Practice* ¶.443[2] at 572 ("To avoid collateral estoppel on the ground that the facts found in the first action have a different legal significance in the second suit, it is necessary to show that the difference in significance is substantial."); *accord Jim Beam Brands Co. v. Beamish & Crawford Ltd.*, 937 F.2d 729, 734 (2d Cir.1991) ("Issues that may bear the same label are nonetheless not identical if the standards governing them are significantly different."); *James Talcott, Inc. v. Allahabad Bank, Ltd.*, 444 F.2d 451, 459 n. 8 (5th Cir.1971) ("There are circumstances when the same historical factual circumstances may be involved in the two actions, but the legal significance of the fact differs in the two actions because different legal standards are simultaneously applicable to it. This is a very narrow exception to the rule with respect to identity of issues, however, and is applicable only when there is a demonstrable difference in the legal standards by which the facts are evaluated."). To resolve this issue, we must, of course, identify the

precise question or questions at issue both in *Schmoll* and in this case.

In *Schmoll*, the court faced the issue "whether Raytech is liable as a successor for Raymark Industries' production, sale and distribution of products containing asbestos." *Schmoll*, 703 F.Supp. at 869. This issue necessitated a determination of whether the transfers of corporate assets resulting in the formation of Raytech were designed to escape asbestos-related liability. *See Schmoll*, 703 F.Supp. at 872. In its complaint in this case, Raytech states that it seeks "a declaratory judgment that it is not liable for the asbestos-related personal injury claims asserted against Raymark Corporation and/or Raymark Industries, Inc." Raytech's complaint further specifies that it seeks a declaration that "[u]nder the applicable law, neither Raytech nor any non-filing subsidiary is a successor in interest" to either Raymark Corporation or Raymark Industries.

At first blush, the issues presented by the two cases appear identical. And while we believe them to be identical in the final analysis, we acknowledge that the question of their identity is more difficult than it might at first seem.

In *Schmoll*, the court sought to determine whether *under Oregon law*, Raytech was liable as a successor for Raymark's asbestos-related liability. *See Schmoll*, 703 F.Supp. at 872 n. 6. In this case, the district court faced the question whether, under some undetermined *"applicable law,"* Raytech is liable as a successor for Raymark's asbestos-related liability. According to Raytech, in all jurisdictions except the state of Oregon, fraudulent conduct in connection with a corporate sale of assets must be found before successor liability may be imposed. Thus, Raytech contends, in *Schmoll*, a case decided under Oregon law, the court did not decide the very issue presented by this case, namely, whether the transactions creating Raytech were carried out *fraudulently* in order to escape liability. "Any fair reading of the *Schmoll* opinion," Raytech argues, "reveals immediately that the Court not only did not decide the fraud issue, it obviously did not consider fraud to be

an element of the 'fraudulent transaction' exception under Oregon law."

Raytech's arguments to the contrary notwithstanding, Oregon's law of successor liability is neither substantially nor even demonstrably different from the law of successor liability applicable in other jurisdictions. An examination of court's analysis in *Schmoll* reveals that the issue presented and determined in *Schmoll* is identical to the issue presented for determination in this case. In *Schmoll* the court began its analysis by stating that "Oregon courts reject transfers of corporate assets designed to escape liability." *Schmoll*, 703 F.Supp. at 872. The court proceeded to assess the effects of the asset transfer involved in the creation of Raytech:

> Raymark Industries had valuable assets, RIPG and Wet Clutch & Brake. It conveyed these assets to Raytech, which was owned by Raymark Industries' former shareholders. This transaction left Raymark Industries with staggering asbestos liabilities, unprofitable operations, unsecured notes, and stock which could not be sold in large blocks without a deep discount.
>
> Present and future asbestos tort claimants, as Raymark Industries' potential creditors, were likewise left with little in the transaction. The money Raytech paid for Raymark Industries' profit-generating assets will not adequately compensate present and future claimants. If Raytech escapes liability for Raymark Industries' torts, these creditors will no longer have access to Raymark Industries' valuable assets or to the potential stream of profits generated by these assets.

Schmoll, 703 F.Supp. at 873. Based largely upon these indicia of bad intent, the court concluded that although the corporate restructuring met the technical formalities of corporate form, because they were "designed with the improper purpose of escaping asbestos-related liabilities," there was "no just reason to respect the integrity of the transactions." *Id.* at 874. Raymark had made substantial profits from the production of asbestos-containing products, and the *Schmoll* court was not going to let it avoid

liability by transferring its profitable assets while leaving of itself "no more than a corporate shell unable to satisfy its asbestos-related obligations." *Id.*

[5] As already noted, Raytech has sought to distinguish *Schmoll's* successor liability analysis from the successor liability analysis required in "every other jurisdiction" principally by pointing out *Schmoll's* failure to make an explicit finding that the transactions giving rise to Raytech involved *"fraudulent"* conduct. Again, according to Raytech, in every jurisdiction but Oregon, the law requires a specific finding of fraud before successor liability may be imposed. This simply is not the case.[6] To impose liability on the successor corporation, the law in every jurisdiction, including Oregon, requires a finding that the corporate transfer of assets "is for the *fraudulent purpose* of escaping liability." Fletcher *Cyclopedia of the Law of Private Corporations* § 7122 at 232. The word "fraudulent," as it appears in Fletcher's *Cyclopedia*, the very source cited by Raytech as setting forth the four exceptions to successor non-liability "recognized in all jurisdictions" (*see* n. 6 *supra*), characterizes or modifies not the actual means of the transfer of assets or the conduct undertaken in furtherance thereof,

6 It is a "well-settled rule of corporate law [that] where one company sells or transfers all of its assets to another, the second entity does not become liable for the debts and liabilities, including torts, of the transferor." *Polius v. Clark Equipment Co.*, 802 F.2d 75, 77 (3d Cir.1986). This then is the general rule of successor liability, recognized in all jurisdictions: when a corporation purchases all or most of the assets of another corporation, the purchasing corporation does not assume the debts and liabilities of the selling corporation. *See* 15 Fletcher *Cyclopedia of the Law of Private Corporations* § 7122 at 232. There are four widely recognized exceptions to this general rule. The successor corporation does inherit liability where (1) the purchaser expressly or implicitly agrees to assume liability, (2) the purchase is a de facto consolidation or merger, (3) the purchaser is a mere continuation of the seller, or (4) the transfer of assets is for the "fraudulent purpose of escaping liability." *Id.* The parties dispute neither the nation-wide applicability of the general rule nor the presence in every jurisdiction of the four exceptions.

but rather the *purpose* of such transfer. Under Fletcher's articulation of the exception, transferring corporate assets for the purpose, or with the intention, of escaping liability is, by definition, a transfer of assets with fraudulent purpose.

[6] As the district court observed, implicit in *Schmoll* is the finding that the transfer of corporate assets giving rise to Raytech, undertaken for the purpose or with the intent of escaping liability, was a transfer undertaken with fraudulent purpose or intent. Even though the court in *Schmoll* omitted the word "fraudulent" in the course of its successor liability analysis, the indicia of improper purpose upon which the *Schmoll* court largely relied are the same factors that Raytech itself acknowledges are generally considered by courts when determining whether a transfer of corporate assets was undertaken for the fraudulent purpose of escaping liability. Thus, the issue addressed and resolved by *Schmoll* is "in substance the same" issue Raytech has raised in this case; accordingly, we conclude that the collateral estoppel doctrine's identity of issues requirement is satisfied in these circumstances. *See Montana v. United States*, 440 U.S. 147, 155, 99 S.Ct. 970, 974, 59 L.Ed.2d 210 (1979) (the identity of issues requirement is fulfilled where the issues in the current case are "in substance the same" as those previously resolved).[7]

7 Entangled within its argument that Oregon law is outside the realm of traditional successor liability law is Raytech's argument that *Schmoll* was simply wrongly decided. However, we need not dwell on this contention. Any argument that the successor liability issue was erroneously decided in *Schmoll* is wholly without relevance to our collateral estoppel inquiry. "A judgment merely voidable because based on an erroneous view of the law is not open to collateral attack." *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S.Ct. 2424, 2428, 69 L.Ed.2d 103 (1981). Not only is the argument that *Schmoll* was wrongly decided irrelevant, it is brought before a tribunal thousands of miles from whence it arose. The remedy for a wrongly decided district court case from the District of Oregon is, of course, appeal to the Ninth Circuit and possible review by the Supreme Court. Raytech did in fact appeal *Schmoll* to our sister court of appeals--and lost. *See Schmoll v.*

B. *Change in Facts Essential to Schmoll*

As noted above, even if all four requirements of collateral estoppel are met, changes in "controlling" facts, that is, facts "essential to a judgment" will render collateral estoppel inapplicable in a subsequent action raising the same issues. *Montana*, 440 U.S. at 155, 159, 99 S.Ct. at 974, 976. Raytech contends that facts essential to the judgment in *Schmoll* have changed and that it should not be collaterally estopped from raising the successor liability issue again in this case. Raytech argues that central to the *Schmoll* court's successor liability analysis was its view that Raymark would not realize the full benefit of the sale to Raytech of RIPG and Wet Clutch & Brake. Indeed, the *Schmoll* court observed that at the time of the sale of these assets to Raytech, Raymark received the lion's share of the purchase price in the form of unsecured notes and Raytech stock that could not be sold in large blocks without a deep discount. *See Schmoll*, 703 F.Supp. at 873. According to Raytech, the facts regarding Raytech's payment for the assets purchased from Raymark have changed dramatically since *Schmoll* was decided. Raytech argues that the evidence available now, which was not and could not have been presented to the court in *Schmoll*, establishes that all notes made payable to Raymark by Raytech are current and all stock payments have been made in cash in lieu of stock at Raymark's request. Raytech further notes that of the $85.1 million Raytech agreed to pay for the assets in question, Raytech has paid in excess of $63 million to date. Thus, Raytech argues, with these new facts in hand, facts which it considers "essential to the judgement" for purposes of assessing the applicability of collateral estoppel, the court in *Schmoll* would not have imposed successor liability upon it.

[7] We begin by parsing an old, familiar source to acquire a sense of what "essential" encompasses in this context. That which

ACandS, Inc., 977 F.2d 499 (9th Cir.1992). Raytech apparently did not seek Supreme Court review.

is indispensably necessary or requisite is commonly referred to as "essential." *See Blacks Law Dictionary* 490 (5th ed. 1979). Under the generally accepted meaning of the term, a fact may be deemed *essential* to a judgment where, without that fact, the judgment would lack factual support sufficient to sustain it. *See id.* ("[t]hat which is required for the continued existence of a thing" is essential). What facts were essential to the *Schmoll* decision, is, of course, the question. To answer this question, we turn again to the *Schmoll* opinion.

[8] In deciding to impose successor liability upon Raytech, the court in *Schmoll* relied in part upon the presence of direct evidence of intent to avoid liability. For example, the court relied upon statements made by participants in the suspect transactions indicating that the elaborate transfer of assets had been designed specifically to effect the avoidance of liability. *Schmoll*, 703 F.Supp. at 873-74. The court noted Raymark's 1985 annual report, in which the company articulated its long term strategy:

> to protect and enhance shareholder investment, to maximize the amounts available for deserving asbestos-injured claimants and to limit exposure for asbestos claims only to businesses currently threatened, thus enabling our other businesses and any new business opportunities to grow, unshadowed by the cloud of asbestos liability.

Schmoll, 703 F.Supp. at 873-74. The court also noted the statements of John Kutzler and Craig Smith, holders of various high-level positions at both Raymark and Raytech. Mr. Kutzler had stated that the intention of the restructuring " 'was to remove an asset through different ownership from the exposure of the asbestos litigation.'" *Id.* at 874. Mr. Smith testified that the restructuring had been designed to insulate Raytech from Raymark's liabilities. *Id.* The court also examined the overall context of the corporate restructuring, finding that it smacked of dubious intent.

> Raymark Corporation changed from the parent of Raymark Industries to the subsidiary of Raytech to the subsidiary of

> ALM. Raytech purchased Raymark Corporation's two valuable assets and then sold the remainder to ALM for $1 million. It is inconceivable that in an arms-length corporate transaction, a buyer would have purchased an entity [i.e., Raymark Corporation] so lacking in assets and laden with liabilities.

Schmoll, 703 F.Supp. at 874. The court was also deeply troubled by the fact that Raytech was entirely owned by the former shareholders of Raymark Industries, so that the exact same shareholders who once owned a company, i.e., Raymark Industries, possessing both profitable assets and staggering asbestos liabilities, now owned a company, i.e., Raytech, possessing profitable assets and no asbestos liability. The ownership of ALM, the entity upon which Raytech foisted Raymark's asbestos liabilities, also factored into the court's decision to impose successor liability. ALM was a wholly owned subsidiary of the Litigation Control Corporation. Craig Smith was a division president at Raymark Corporation from 1980 to 1985. In 1985, Smith became president and chief executive officer of Raymark. By the time *Schmoll* was decided, Smith had become president and chief executive officer of Raytech, and had established the Litigation Control Corporation. Moreover, at the time *Schmoll* was decided, Smith owned 45 percent of the shares of the Litigation Control Corporation, with his son owning another 15 percent. This is precisely why the court doubted the *bona fides* of the sale of Raymark to ALM following the purchase by Raytech of Raymark's profitable assets. While the court also placed some emphasis upon the facts that Raytech had passed unsecured notes and Raytech stock of questionable value to Raymark as part of the purchase price for RIPG and Wet Clutch & Brake, the court appears to have been equally troubled by the fact that the restructuring left Raymark's creditors without access to the potential stream of profits generated by RIPG and Wet Clutch & Brake. *See Schmoll*, 703 F.Supp. at 873. This latter concern would have been warranted regardless of the value of the consideration passed by Raytech to Raymark.

Based upon all of these considerations, the *Schmoll* court imposed successor liability upon Raytech. And for the following reasons, we believe the court would have done so even if it *had* known of Raytech's continued payments of its note and stock obligations.

First, Raytech's contention in this appeal that "essential facts" have changed is in fact an updated version of a similar argument it made on appeal of the *Schmoll* decision before the Court of Appeals for the Ninth Circuit. In its brief filed in the Ninth Circuit, Raytech urged (with citations to the trial court record) that the court consider that "[a]s of the time of trial, Raytech had paid Raymark each of the note and stock payments required by the contracts for the purchase and sale of GmbH and WC & B." Thus, while Raytech has paid substantially more of its note and stock obligations since the time of the *Schmoll* trial, and in that sense, certain facts have changed, it cannot be argued that the basic fact of Raytech's payment on the notes was unknown to the *Schmoll* court when it imposed successor liability.

We also note that it was not the failure or the inadequacy of consideration proffered by Raytech for the purchase of Raymark's profitable assets that so deeply troubled the court in *Schmoll*; instead the court viewed the transaction as rife with improper intent, due in part to the *type* of consideration passed. Whether Raytech paid on the unsecured notes or not, the notes remained unsecured. And while the *Schmoll* court relied upon the unsecured status of the notes to confirm its view that the transaction was not an arm's-length deal, it never per se addressed the collectibility of the notes, or the prospect of payments being made pursuant to them. We agree with the Committee of Unsecured Creditors of Raytech Corporation: had the *Schmoll* court compared the value of the consideration paid by Raytech to Raymark to the value of the assets transferred, and had it found the value of the former significantly less than the latter because of doubts as to the ability or willingness of Raytech to honor its obligations, then Raytech's "changed essential facts" argument might have force. Supplemental Brief of Appellees Committee of Unsecured Creditors of Raytech

Corporation at 7. But that is not what happened. The *Schmoll* court did not address the likelihood that the notes given by Raytech would not be paid.

In light of the fact that evidence of payment on the notes during the one year preceding the *Schmoll* trial was placed before both the *Schmoll* court and the Ninth Circuit, coupled with the fact that neither the district court in *Schmoll* nor the Ninth Circuit on Raytech's appeal were particularly impressed by the fact of Raytech's payments, we conclude that Raytech's evidence of additional payments on the notes and stock obligations does not establish a change in facts essential to the *Schmoll* judgment.

C. *Fairness Considerations*

The Supreme Court has granted district courts "broad discretion" to determine when a plaintiff who has met the requisites for the application of collateral estoppel may employ that doctrine offensively. *See ParkLane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979). In an attempt to provide general guidance as to the exercise of that discretion, the Court explained that:

> If a defendant in the first action is sued for small or nominal damages, he [or she] may have little incentive to defend vigorously, particularly if future suits are not foreseeable. Allowing offensive collateral estoppel may also be unfair to a defendant if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant. Still another situation where it might be unfair to apply offensive estoppel is where a second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result.... The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed above or for other reasons, the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.

Id. at 330-31, 99 S.Ct. at 651 (citations and footnotes omitted). A finding of fairness to the defendant is thus a necessary premise to the application of offensive collateral estoppel.[8]

In arguing that it would be unfairly penalized if collaterally estopped from relitigating the successor liability issue, Raytech places principal reliance, again, upon its argument that critical facts have changed.[9] As should be clear from our prior discussion, we do not agree that facts *essential* to the *Schmoll* decision have changed. But it is also beyond debate that certain facts *have* changed. In the aftermath of the *Schmoll* decision, for instance, Raytech has paid over to Raymark considerable additional sums of money.[10] The question is, do the factual changes that have

8 This notion of fairness reflects the equitable nature of issue preclusion generally. *See Jack Faucett Associates v. American Tel. & Tel.*, 744 F.2d 118, 125 (D.C.Cir.1984). The Court of Appeals for the Fifth Circuit has commented that offensive collateral estoppel is "even a cut above [collateral estoppel] in the scale of equitable values." *Nations v. Sun Oil Co. (Delaware)*, 705 F.2d 742, 744 (5th Cir.1983).

9 Most of the other points Raytech makes in support of its fairness argument are, in actuality, attempts by Raytech to challenge the *Schmoll* opinion on the merits. As for Raytech's argument that it could not have foreseen the import of the *Schmoll* case at the time the case was litigated, we agree with the district court that the record only serves to belie this position and suggests instead that Raytech was well aware of the stakes involved in *Schmoll*. The *Schmoll* court itself observed that the parties submitted thousands of pages of documents and deposition transcripts for its consideration regarding the successor liability issue. *See Schmoll*, 703 F.Supp. at 869.

10 According to Raytech, Raytech has paid Raymark over $63 million to date for the sale of RIPG and Wet Clutch & Brake. While we do not know how much of this money Raytech has paid since the handing down of the *Schmoll* decision, we think it safe to conjecture that Raytech has paid over to Raymark several tens of millions of dollars since *Schmoll* was decided.

occurred render the application of collateral estoppel unfair to Raytech? We do not think so.

In the wake of *Schmoll*, Raytech has had every incentive to act in a manner so as to fortify its argument that it should not be collaterally estopped from relitigating the issue of its successor liability. Moreover, equitable *appearances* have, no doubt, been shaded to Raytech's advantage as a result of its continued payments on the unsecured notes. However, while we fully understand that it would be unfortunate from Raytech's perspective were the district court's application of collateral estoppel allowed to stand, we fail to see how such an eventuality might be deemed "unfair" to Raytech as that term is utilized in *ParkLane Hosiery*. We have already concluded that the *Schmoll* court would reach the same result were it now presented with the issue of Raytech's successor liability, changes in facts notwithstanding. The necessary implication of this conclusion is that Raytech will suffer absolutely no unfairness should the district court's application of collateral estoppel stand.

III. CONCLUSION

Having found the requisite identity of issues, and having concluded that essential facts have not changed between the time *Schmoll* was decided and the time the district court applied the doctrine of collateral estoppel in this case, we cannot but conclude that the district court did not abuse its discretion in barring the relitigation of Raytech's successor liability. We will, therefore, affirm.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

RAYTECH CORPORATION,	:	
	:	
Plaintiff,	:	Civ. No.
v.	:	B-89-623 (TFGD)
	:	
EARL WHITE, YVONNE WHITE, PASQUALE DICINTIO, MARIE DICINTIO, LARRY BENZIE, Executor of the Estate of Edward Benzie, EUGENE KLINGENBERGER, MARGIE KLINGENBERGER, JOHN DOE and all others similarly situated,	:	
	:	
Defendants.	:	AUGUST 28, 1991

RULING AND ORDER

In yet another effort to remove the cloud of asbestos liability from its shareholders' heads, Raytech Corporation ("Raytech") has moved to certify a mandatory defendant class in this adversary proceeding pursuant to Bankruptcy Rule 7023 and Rule 23 of the Federal Rules of Civil Procedure. Through the vehicle of this sought class action, Raytech essentially seeks a declaratory judgment in a single forum of national jurisdiction on the issue of whether it is liable as a successor to Raymark Industries, Inc. ("Raymark Industries", formerly known as Raybestos-Manhattan, Inc.) and/or

Raymark Corporation for asbestos-related personal injury and wrongful death claims asserted against both companies.

The Court's consideration of the class certification issue has been an abbreviated one. Directed by the defendants' pleadings to the possible preclusive impact on this action of the Honorable Owen M. Panner's recent decision in Schmoll v. ACandS, Inc., 703 F. Supp. 868 (D. Or. 1988), and having studied the parties' responses to an Order requesting supplemental briefing concerning the effect of the Schmoll case, the Court has concluded that this action cannot proceed as presently constituted. Specifically, for the reasons stated below, the Court orders count I of Raytech's complaint dismissed, and further orders additional briefing by the parties with respect to counts II and III. Consistent with this Ruling, consideration of the class certification issue is deferred pending the Court's consideration of the supplemental briefing ordered herein.

BACKGROUND

Responding to the filing of nearly 1,000 lawsuits across the country alleging its liability for asbestos-related personal injury and wrongful death claims asserted against Raymark Industries and/or Raymark Corporation, Raytech[1] filed a petition in the United States Bankruptcy Court for the District of Connecticut under Chapter 11 of the Bankruptcy Code on March 10, 1989. At the time of the filing, Raytech had not

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1 Raytech is headquartered in Shelton, Connecticut. It is a holding company whose subsidiaries manufacture energy absorption and power transmission products, as well as fasteners and custom engineered components. Complaint at ¶ 4.

yet been named in some 46,000 other lawsuits pending against Raymark Industries and/or Raymark Corporation.[2]

On June 16, 1989, Raytech filed an adversary proceeding in the Bankruptcy Court seeking: a) appointment of a guardian to protect the rights of future claimants in the litigation; b) certification of a defendant class of present and future claimants against Raytech pursuant to either Federal Rule of Civil Procedure 23(b)(1)(B) or Rule 23(b)(2); and c) a declaration that 1) neither Raytech nor any of its subsidiaries is a successor-in-interest or alter ego of Raymark Industries or Raymark Corporation; 2) the sales of Raybestos Industrie Produkte GmbH ("RIPG") stock and assets of the Wet Clutch and Brake division ("WC & B") by Raymark Corporation and Raymark Industries to Raytech were not

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2 Raytech offered more current figures at the class certification hearing held before this Court on November 15-16, 1990, introducing evidence that it and/or its subsidiary, Raytech Composites, Inc., were named defendants in approximately 3,921 asbestos-related cases alleging Raytech's liability as a successor in interest and/or alter ego of Raymark Corporation and/or Raymark Industries, and/or named defendants in cases alleging that the stock and asset purchases from Raymark Industries were fraudulent conveyances. See Exhs. 43, 44. Raytech further offered testimony that as of September 30, 1990, approximately 68,855 plaintiffs had asbestos-related personal injury claims pending against Raymark Industries. Nov. 15, 1990 Trans. at 31. Raytech contends that there is a substantial likelihood these plaintiffs also will assert claims against Raytech and/or its subsidiaries.

fraudulent conveyances; and 3) a declaration and adjudication that neither Raytech nor any subsidiary is responsible for any asbestos-related liabilities of Raymark Industries or Raymark Corporation, including any liability for punitive damages. On November 2, 1989, this Court granted Raytech's Motion to Withdraw its Order of Reference to the Bankruptcy Court for the limited purpose of trying this adversary proceeding.

The Court has already ruled on the first of Raytech's requests, granting Raytech's Motion for Appointment of a Guardian Ad Litem on July 25, 1990. The next item on the Court's agenda was to be the question of class certification.[3] The Court's consideration of this issue has, however, been a necessarily abbreviated one. Included among the various submissions received by the Court relative to the class certification issue was a copy of then-Chief Judge Panner's decision in Schmoll. Careful review of that decision has prompted the Court to consider whether Raytech's adversary proceeding may go forward at all, irrespective of any class

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3 Raytech seeks certification of a class of the now-over 3,000 defendants who have asbestos-related personal injury claims currently pending against Raytech and/or its subsidiaries based upon theories of successor liability, alter ego and/or fraudulent conveyance. Raytech also seeks to include in the class the tens of thousands who have filed claims against Raymark Industries and/or Raymark Corporation and who, Raytech alleges, therefore reasonably may be expected to file such successor liability, alter ego and/or fraudulent conveyance claims against Raytech. Lastly, Raytech seeks to include all persons who may file such claims in the future upon the manifestation of an asbestos-related injury.

certification issues. Its evaluation of the Schmoll decision follows.

DISCUSSION

The Court prefaces its analysis with the observations that collateral estoppel has already been raised as an affirmative defense by numerous defendants in this action,[4] and that the Court effectively put the parties on notice that Schmoll potentially left a sua sponte dismissal on such grounds in the offing. See March 28, 1991 Order. Accordingly, the Court sees no due process bar to its consideration of sua sponte dismissal in this case. See Leonhard v. United States, 633 F.2d 599, 609 n.11 (2d Cir. 1980), cert. denied, 451 U.S. 908 (1981) (where defendant's answer pleaded statute of limitations, and where facts supporting the defense are set forth in plaintiff's papers, no error in sua sponte dismissal on that basis); W. E. Hedger Transp. Corp. v. Ira S. Bushey & Sons, Inc., 186 F.2d 236 (2d Cir. 1951) (affirming district

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4 An affirmative defense which must be pleaded or be deemed waived, see Fed. R. Civ. P. 8(c), collateral estoppel is raised in all answers filed with the Court. See Answer of defendants Earl White, Yvonne White, Eugene Klingenberger and Margie Klingenberger at 6 (eighth affirmative defense) (filed August 21, 1989); Answer of defendants Pasquale Dicintio and Marie Dicintio at 7 (eighth affirmative defense) (filed September 6, 1989); Answer of defendant Larry Benzie at 8 (ninth affirmative defense) (filed September 6, 1989); Answer of Intervenor Creditors' Committee at 7 (fourth affirmative defense) (filed June 18, 1990). Future Claimants' have yet to file an answer.

court's sua sponte dismissal of complaint on res judicata grounds); cf. United States of Sioux Nations of Indians, 448 U.S. 371, 432 (1980) (Rehnquist, J., dissenting) ("if a court is on notice that it has previously decided the issue presented, the court may dismiss the action sua sponte, even though the defense has not been raised") (citations omitted).

Although the Schmoll decision will command far more discussion further in this opinion, some history of the case bears mention at the outset. Plaintiff Raymond Schmoll filed a products liability complaint against Raytech, Raymark Industries and other defendants in the United States District Court for the District of Oregon, seeking damages for injuries allegedly caused by his inhalation of asbestos dust from products manufactured or sold by defendants. On the eve of trial, the sole remaining parties to the action, Raytech, Raymark Industries and Mr. Schmoll, stipulated to a bifurcation of the proceedings and agreed to submit the question of whether Raytech was a successor in liability to Raymark Industries to then-Chief Judge Panner. See Schmoll, 703 F. Supp. at 869; Mutnick Affid. at 2; Reed Affid. at 3.

After substantial briefing of the issue, Chief Judge Panner filed an Order on October 20, 1988, stating his conclusion that Raytech was a successor to Raymark Corporation and liable, as such, for Raymark Corporation's actions relating to the production, sale and distribution of products containing asbestos. See Exh. G. to Mutnick Affidavit. In a subsequent decision filed on December 23, 1988,[5] Judge Panner articu-

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5 Although the October 20, 1988 Order voiced the conclusion that Raytech was a successor to Raymark Corporation, the supporting decision speaks to (continued...)

lated the legal basis for his prior Order. See Schmoll, 703 F. Supp. 868. His analysis began with a statement of the general rule under Oregon law[6] that "when a corporation purchases all or most of the assets of another corporation, the purchasing corporation does not assume the debts and liabilities of the selling corporation." Id. at 872 (citation omitted). Judge Panner proceeded to cite the four exceptions to this rule:

> the purchasing corporation may be responsible for the selling corporation's obligations if (1) the purchasing corporation expressly or impliedly agrees to assume those liabilities; (2) the transaction amounts to a consolidation or merger of the corporations; (3) the purchasing corporation is a continuation of the selling corporation; or (4) the corporations enter the transaction to escape liability.

Id. (citations omitted).

5(...continued)

Raytech only as a successor in liability to Raymark Industries. As Raymark Corporation is the parent and sole shareholder of Raymark Industries, the Court finds Judge Panner's alternating references of little significance, at least for the purposes of this Ruling.

6 The Schmoll defendants' alleged tortious acts having occurred in Oregon, the parties to that diversity action agreed that Oregon law applied. See Schmoll, 703 F. Supp. at 872 n.6.

After conducting an exhaustive review of the extensive corporate restructurings ultimately resulting in Raytech's creation in June 1986, and the corporate maneuverings which followed, Judge Panner rejected Raytech's suggestion that as an innocent, successor corporation, it should not be liable for the acts or omissions of its predecessors. He concluded instead that the fourth exception cited above applied in the case before him. As a result of Raymark Industries' conveyance of the RIPG stock and the WC & B operating division to Raytech, Judge Panner found that that corporation effectively owned "the two historically lucrative businesses of Raymark Industries, without the drain of asbestos-related litigation." Id. Based on the context of the restructuring and the participants' statements, Judge Panner found that such a result was not inadvertent but rather the very intended result of the restructurings, whose purpose was, simply stated, "to escape liability." Id. at 873. Judge Panner stated:

> I find that, although the corporate restructuring meets the technical formalities of corporate form, it was designed with the improper purpose of escaping asbestos-related liabilities. Raymark Corporation changed from the parent of Raymark Industries to the subsidiary of Raytech to the subsidiary of ALM [Asbestos Litigation Management]. Raytech purchased Raymark Corporation's two valuable assets and then sold the remainder to ALM for $1 million. It is inconceivable that in an arms-length corporate transaction, a buyer would have purchased an entity so lacking in assets and laden with liabilities.
>
> There is no just reason to respect the integrity of these transactions. Raymark Industries made substantial profits from the production of asbestos-containing products. Raymark Industries should not be allowed

> to avoid liability by transferring its profitable assets leaving no more than a corporate shell unable to satisfy its asbestos-related obligations.

Id. at 874. Having concluded that the restructurings thus fell within one of the four exceptions to the general rule of non-liability of a purchasing corporation, Judge Panner found that Raytech was a successor in liability to Raymark, and liable, as such, for its asbestos-related torts.[7]

This Court's analysis of the preclusive effect, if any, of the Schmoll decision on this action, begins with what commentators have aptly termed a "bewildering" question, see 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4472 at 725, specifically, that of which law, state or federal, governs the preclusive effect in a subsequent federal diversity proceeding of a prior federal diversity adjudication turning on state law.[8] While the issue has been extensively treated in other

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7 Judge Panner observed that the case presented serious equitable considerations as well: "[t}he money Raytech paid for Raymark Industries' profit-generating assets will not adequately compensate present and future claimants. If Raytech escapes liability for Raymark Industries' torts, these creditors will no longer have access to Raymark Industries' valuable assets or to the potential stream of profits generated by these assets." Id. at 873.

8 It is beyond dispute that the preclusive effect of a decision based on federal question jurisdiction is determined by federal law. See Gelb v. Royal

(continued...)

circuits, it is, as yet, unresolved in the Second Circuit. The predominant trend elsewhere has been to apply federal preclusive law in a subsequent diversity action. See Johnson v. SCA Disposal Serv. of New England, Inc., 931 F.2d 970, 974 (1st Cir. 1991); Shoup v. Bell & Howell, Co., 872 F.2d 1178, 1179 (4th Cir. 1989); Hardy v. Johnson-Manville Sales Corp., 681 F.2d 334, 337 (5th Cir. 1982); Silcox v. United Trucking Serv., Inc., 687 F.2d 848, 852 (6th Cir. 1982); Petromanagement Corp. v. Acme-Thomas, 835 F.2d 1329, 1332-33 (10th Cir. 1988); Precision Air Parts, Inc. v. Avco Corp., 736 F.2d 1499, 1503 (11th Cir. 1984), cert. denied, 469 U.S. 1191 (1985). Contra Lane v. Sullivan, 900 F.2d 1247, 1249-50 (8th Cir.), cert. denied, ___ U.S. ___, 111 S. Ct. 134 (1990); Melikian v. Corradetti, 791 F.2d 274 (3d Cir. 1986); Costantini v. Trans World Airlines, 681 F.2d

8(...continued)

Globe Ins. Co., 798 F.2d 38, 42, cert. denied, 480 U.S. 948 (1987); 18 Charles A. Wright et al., Federal Practice & Procedure § 4466 at 618. Arguably, the fact that jurisdiction in the instant matter is grounded both in bankruptcy and diversity, see Complaint at ¶ 2 (citing jurisdiction pursuant to 28 U.S.C. §§ 1332 [diversity] and 1334(b) ["the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11"]) obviates the need for any further inquiry. Because the Court has not found a similarly situated case discussing this issue, it shall proceed, however, as though the sole basis for jurisdiction was the diversity of the parties.

1199, 1201 (9th Cir.), cert. denied, 459 U.S. 1087 (1982).[9] This majority approach is favored by commentators as well. See, e.g., Restatement (Second) of Judgments § 87 (1982) ("[f]ederal law determines the effects under the rules of res judicata of a judgment of a federal court"); 18 Charles A. Wright et al., Federal Practice and Procedure § 4472 at 733.

Those courts subscribing to the majority approach have stressed the necessity of preserving the integrity of federal court judgments through the application of federal preclusive principles, and of avoiding duplicative litigation in the federal court system, even where the prior decision was based on state law. See, e.g., Hardy, 681 F.2d at 337 ("As the authors of the Restatement (Second) -- Judgments conclude, the principle of finality essential to a court's authority demands that 'federal law determine the effects under the rules of res judicata of a judgment of a federal court'"): Kern v. Hettinger, 303 F.2d 333, 340 (2d Cir. 1962) ("One of the strongest policies a court can have is that of determining the scope of its own judgments. It would be destructive of the basic principles of the Federal Rules of Civil Procedure to say that the effect of a judgment of a federal court was governed by the law of the state where the court sits simply because the source of federal jurisdiction is diversi-

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9 The issue remains unresolved in the Seventh and D.C. Circuits. Compare Gasbarra v. Park-Ohio Indus., 655 F.2d 119, 122 (7th Cir. 1981) with In re Energy Cooperative, Inc., 814 F.2d 1226, 1230 (7th Cir.), cert. denied, 484 U.S. 928 (1987); compare U.S. Indus., Inc. v. Blake Constr. Co., 765 F.2d 195, 204 n.20 (D.C. Cir. 1985) with Answering Serv., Inc. v. Egan, 728 F.2d 1500, 1505-06 (D.C. Cir. 1984).

ty"). Other courts have determined that preclusion law is substantive and that the Erie doctrine, see Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), mandates that state preclusion law apply in diversity actions. See discussions in Lynch v. Merrell-Nat'l Lab., 830 F.2d 1190, 1192 (1st Cir. 1987); Maher v. City of New Orleans, 516 F.2d 1051, 1056 (5th Cir. 1975), cert. denied, 426 U.S. 905 (1976); Maryland v. Capital Airlines, Inc., 267 F. Supp. 298, 302. But see Petromanagement Corp., 835 F.2d at 1333 ("[w]e think [the Restatement's] approach is proper, at least insofar as the res judicata issue is not clearly substantive; and we adopt the 'federal law controls' rule in this case").

Recent dicta[10] suggests that the Court of Appeals for the Second Circuit will follow the recent trend, as have recent district court decisions within the Circuit. See Tarka v. The Time Inc. Magazine Co., No. 90-5348, 1991 U.S. Dist. LEXIS 343 (S.D.N.Y. Jan. 14, 1991); Johnson v. Eli Lilly and Co., 689 F. Supp. 170 (W.D.N.Y. 1988); see also Weston Funding Corp. v. Lafayette Towers, Inc., 550 F.2d 710 (2d Cir. 1977) (dictum); Kern, 303 F.2d at 340. But see Schlaifer Nance & Co. v. The Estate of Andy Warhol, 764 F. Supp. 43 (S.D.N.Y. 1991); In re New York Asbestos Litigation, 738 F. Supp. 66 (E.D.N.Y. 1990).

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10 See Gelb, 798 F.2d at 42 n.3 ("a state court's power to declare the victor in a particular controversy includes the power to define the scope of the victory. It would seem that federal courts must possess an equivalent power and that federal law should determine the preclusive effect of a federal judgment, without regard to the basis of jurisdiction").

Although inclined to agree that federal law should apply,[11] the Court need not conclusively resolve the issue as the result is the same in this case under application of either the applicable state or federal law of preclusion. Both

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11 The Court finds convincing both the Gelb dicta and Judge Telesca's analysis in Johnson. In addition to the arguments set forth in these opinions, the case at bar includes an additional factor militating in favor of the application of federal preclusive law -- the fact that the basis for jurisdiction is not exclusively diversity but also bankruptcy jurisdiction see 28 U.S.C. § 1334(b), which basis arguably implicitly implicates federal concerns. See supra note 8.

None of the parties to this action have afforded much discussion to the choice of law issue. Both the future claimants and Raytech relegate the question to a mere footnote. As for the respective positions of the parties, both the future claimants' and creditors' committee submit that federal law governs the preclusive effect issue. See Future Claimants' Mem. at 5 n. *, Creditors' Comm. Brief at 3-4. Acknowledging the split of authority regarding the question, Raytech states that "the last word in this Circuit is that state law controls," Raytech Supp. Mem. Brief at 5 n.7, while inexplicably ignoring the most recent signal from the Circuit's highest court in Gelb. As to which state law would apply, Raytech merely states in conclusory fashion that "a Connecticut court would opt for Connecticut law in order to preserve the policies of fundamental fairness embodied in the mutuality requirement." Id. (citations omitted).

federal preclusive law, see Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979), and Oregon state preclusive law, see Bahler v. Fletcher, 257 Or. 1, 474 P.2d 329 (1970), recognize the doctrine of offensive collateral estoppel, the particular branch of the preclusive tree at issue here.[12] The Court notes that it cannot agree with Raytech that Connecticut state preclusive law has any impact on this analysis. It is neither a Connecticut state judgment nor a Federal District Court of Connecticut judgment whose scope is being determined here. For an excellent discussion of this point, see Semler v. Psychiatric Inst., 575 F.2d 922, 927-28 (D.C. Cir. 1978). The Court turns now to a discussion of the precise elements of this doctrine.

Invocation of the doctrine of collateral estoppel is contingent upon satisfaction of the following elements: 1) the issue in both proceedings must be identical; 2) the issue in the prior proceeding must have been actually litigated and actually decided by a court of competent jurisdiction; 3) there must have been a fair and full opportunity for litigation in the prior proceeding; and 4) the issue previously litigated must have been necessary to support a valid and final judgment on the merits.[13] These elements are uniformly applied both in

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12 A case involves the offensive use of collateral estoppel when, as in the reversal of the parties in this declaratory judgment action, "the plaintiff[s] seek[] to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party." Parklane Hosiery, 439 U.S. at 326 n.4.

13 As will be discussed later, even when these prereq- (continued...)

the Second Circuit and in the Oregon state courts. See Gelb, 798 F.2d at 44; Drews v. EBI Cos., 310 Or. 134, 795 P.2d 531 (1990); North Clackamas School Dist. v. White, 305 Or. 48, 750 P.2d 485 (1988); DeLassio v. Garcia, 69 Or. App. 693, 687 P.2d 808 (1984); Bahler v. Fletcher, 257 Or. 1, 474 P.2d 329 (1970). The Court shall address each element seriatim.

1. Identity of the Issues

The issue before Judge Panner in Schmoll is clearly stated in the second line of his opinion: "whether Raytech is liable as a successor for Raymark Industries' production, sale and distribution of products containing asbestos." Schmoll, 703 F. Supp. at 869. Necessarily incorporated in the determination of this larger issue was the question of whether the transfers of corporate assets resulting in and following Raytech's formation were designed to escape liability. Judge Panner concluded that the transactions were so designed and that the transactions thus fell within an exception to the general rule that when a corporation purchases all or most of the assets of another corporation, the purchasing corporation does not assume the debts and liabilities of the selling corporation.

13(...continued)

uisites are satisfied, the use of collateral estoppel in an offensive capacity may lead to unfair results so as to counsel against its use in a particular case. Thus, the general rule of fairness enunciated by the Supreme Court in Parklane Hosiery Co. will necessarily prompt a further line of inquiry should the foregoing elements be satisfied.

In its opening paragraph, the complaint in the case at bar suggests an identical issue to that general one posed in Schmoll: "Raytech Corporation . . . brings this action pursuant to 28 U.S.C. § 2201(a) for a declaratory judgment that it is not liable for asbestos-related personal injury claims asserted against Raymark Corporation [] and/or Raymark Industries, Inc." Comp. at 1, ¶ 1. Later in the complaint, Raytech particularizes the issue stated in paragraph one into the following four questions, each one of which constitutes a separate count of the complaint. The questions are: 1) whether under an unspecified "applicable law", Raytech or any non-filing subsidiary is a successor in interest to Raymark Corporation and/or Raymark Industries; 2) whether under an unspecified "applicable law", either Raytech or any non-filing subsidiary is an alter ego or Raymark Corporation and/or Raymark Industries; 3) whether under an unspecified "applicable law", either the GmbH stock or the WC&B asset sale was a fraudulent conveyance; and 4) whether under an unspecified "applicable law", either Raytech or any non-filing subsidiary is liable at law or in equity for the asbestos-related liabilities of Raymark Corporation and/or Raymark Industries, including any liability for punitive damages. In the first three counts, Raytech essentially seeks to foreclose a determination under any theory, be it successor liability, alter ego or fraudulent conveyance, that it is liable for Raymark Industries and/or Raymark Corporation's asbestos liabilities. The last count simply restates the general issue sought to be resolved.

The identity of issues question is far more problematic than would appear at first blush. As an initial matter, the Court must determine whether the successor liability question facing Judge Panner is identical to that involved in the case at bar. See Comp. at 9 (Count I -- seeking a declaration that "[u]nder the applicable law, neither Raytech nor any non-

filing subsidiary is a successor in interest to Corporation and/or Industries"). Although Judge Panner stated the issue presented to him in broad terms, it was understood by all the parties that the issue would be resolved pursuant to Oregon law. See Schmoll, 703 F. Supp. at 872 n.6. The issue, as such, could equally as appropriately have been phrased as "whether, under Oregon law, Raytech is liable as a successor for Raymark Industries' asbestos related liabilities." The problem confronting this Court in its evaluation of the identity of issues question is that while the same factual circumstances are undoubtedly involved in both actions, namely, the facts surrounding the intricate corporate transactions in play, the legal significance of these facts potentially differ in the two actions. Different legal standards as to successor liability are, arguably, simultaneously applicable to these facts -- Oregon standards on the one hand, and on the other, an as yet undetermined legal standard.[14]

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14 The Court has yet to undertake the choice of law analysis applicable to the underlying action. Any such analysis prior to a ruling on the class certification motion would be premature. See In re Crazy Eddie Litigation, 135 F.R.D. 39, 41 (E.D.N.Y. 1991) ("[a]long with other district courts in this circuit, this court declines to decide choice of law issues on a class certification motion"); Seidman v. Stauffer Chemical Corp., Fed. Sec. Law Reports (CCH) ¶ 94,229 at 94, 236 (Jan. 17, 1986) ("[d]efendants' forecast with respect to the conflicts of law problem . . . does not mandate the denial of class certification. . . . [t]he choice of law issue is not presently before this Court and it would be inappropriate were the Court to decide this issue

(continued...)

In order to defeat a finding of identity of the issues for preclusion purposes, however, the difference in applicable legal standards must be substantial. See 1B James Wm. Moore, Jo D. Lucas & Thomas S. Currier, Moore's Federal Practice ¶ .443[2] at 766-68. As the Fifth Circuit has explained,

> [t]here are circumstances when the same historical factual circumstances may be involved in two actions, but the legal significance of the fact differs in the two actions because different legal standards are simultaneously applicable to it. This is a very narrow exception to the rule with respect to identity of issues, however, and is applicable only when there is a demonstrable difference in the legal standards by which the facts are evaluated.

James Talcott, Inc. v. Allahabad Bank, Ltd., 444 F.2d 451, 459 n.8 (5th Cir.), cert. denied sub nom. City Trade & Indus., Ltd. v. Allahabad Bank, Ltd., 404 U.S. 940 (1971) (citations omitted) (emphasis added); see also Hinchey v. Sellers, 7 N.Y. 2d 287, 165 N.E. 2d 156, 197 N.Y.S. 2d 129 (1959).

No such substantial difference exists here. As plaintiff itself offers, "[t]he 'traditional rule' [regarding successor liability] and its four exceptions are recognized in all jurisdictions." Raytech Supp. Mem. Brief at 4 (citing 15 Fletcher,

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14(...continued)
incident to plaintiffs' motion for class certification").

Cyclopedia of Law of Corporations § 7122 (1961));[15] see also Creditors' Comm. Brief at 12 (because the "improper purpose of escaping liability" exception "is one of the traditional exceptions to the general rule that a successor corporation is not liable for the obligations of its predecessor, and the traditional exceptions are recognized in virtually every state, that finding should also be sufficient to hold Raytech liable under the other states' laws applicable to this action") (footnote omitted); cf. Mutnick Affid. at 2 (Mr. Schmoll's counsel's statement that "my discussions with Mr. Reed reflected a shared belief that the factual issues would not vary from jurisdiction to jurisdiction, that the successor liability law of the states of Connecticut, Oregon and Delaware were not substantively different . . . . "). Thus, even while the Court has yet to undertake the choice of law analysis applicable to the underlying action, see supra note

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15 Raytech's discourse on Judge Panner's failure to make a finding that the transactions were "entered into fraudulently," only serves to muddle its own analysis. Raytech Supp. Mem. at 3-5. The word "fraudulent," as referred to in Fletcher's Cyclopedia, the very source cited to by Raytech for the four exceptions "recognized in all jurisdictions", characterizes not the actual means of the transfer of assets, but rather the purpose of such transfer. See Fletcher, § 7122 at 232 (citing the transfer of assets for the "fraudulent purpose of escaping liability" as one of the exceptions to the general rule that a purchasing corporation does not assume the liabilities of its predecessor). Certainly, Judge Panner's decision contains the implicit determination that any transfer with the purposes of escaping liability is a transfer with a fraudulent purpose.

14, because all jurisdictions recognize the evasion of liability exception cited by Judge Panner, the same issue is raised necessarily in the case at bar -- namely, that of whether the corporate transactions at issue here were entered into for the purpose of escaping liability.

A further question lurks, however. Specifically, having determined that there is an identity of issues with respect to the successor liability theory, the Court must now determine if such identity extends to the alter ego and fraudulent conveyance theories Raytech also seeks to adjudicate in this action. See Comp. at 9 (Counts II and III -- seeking declarations under the applicable law that "neither Raytech nor any non-filing subsidiary is an alter ego of Corporation and/or Industries" and that "neither GmbH stock nor the WC&B asset sale was a fraudulent conveyance"). The Court's concern is with whether any substantial differences exist between the theories themselves, and/or between the theories' application in various jurisdictions. If, in fact, the alter ego and fraudulent conveyance theories merely fall within the rubric of "successor liability," or if the escaping liability exception also applies to those theories in all jurisdictions, identity of issues would extend to the whole of Raytech's complaint.[16]

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16 Raytech's position on this precise question has been an inconsistent one. Compare Raytech Rebuttal Mem. in Supp. of Class Cert. at 11 n.6 (of varying successor liability/alter ego/fraudulent conveyance laws across the country, Raytech stated that "the difference in those laws are not as significant as Defendants suggest") with Comp. at 7, ¶ 29 ("[t]he asbestos-related claims asserted against Raytech

(continued...)

After much consideration, and as more specifically set forth in the conclusion of this Ruling, the Court concludes that further briefing is warranted on this issue. In this Ruling then, the Court shall limit its inquiry to the possible collateral estoppel effect of the Schmoll decision on Count I of Raytech's complain.

2. Actually Litigated

Having concluded that the Schmoll case and the case at bar involve an identical issue, the Court turns its attention to the question of whether that issue was actually litigated and decided by a court of competent jurisdiction. The Court concludes that it was.

According to the Restatement, an issue is "actually litigated" when the "issue is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined." Restatement (Second) of Judgments § 27 cmt. d (1982); see also Continental Can Co., U.S.A. v. Marshall, 603 F.2d 590, 596 (7th Cir. 1979) ("[t]he requirement of collateral estoppel that the issue be 'actually litigated' does not require that the issue be thoroughly litigated . . . . This requirement is generally satisfied if the parties to the original action disputed the issue and the trier of fact resolved it") (citations omitted). An issue is not actually litigated, according to the authors of the Restatement, if the defendant

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16(...continued)

> and/or its non-filing subsidiaries are pending in a number of jurisdictions . . . . Conflicts and inconsistencies exist among the successor liability, fraudulent conveyance and/or alter ego laws of these jurisdictions").

might have interposed the issue as an affirmative defense but failed to do so; if it is raised by a material allegation of a party's pleading but is admitted (explicitly or by virtue of a failure to deny) in a responsive pleading; if it is raised in an allegation by one party and is admitted by the other before evidence on the issue is adduced at trial; or if it is the subject matter of a stipulation between the parties. Restatement (Second) of Judgments § 27 cmt. e. None of the foregoing exceptions are at issue in this case. Indeed, there is no claim from any party to this action that the successor liability question was not actually litigated. The Court therefore deems this prong of the collateral estoppel test satisfied.

3. Full and Fair Opportunity to Litigate

As stated by the Oregon Supreme Court, "[t]he public's interest in minimizing relitigation of an issue once decided is subservient only to the requirement that a party be given a full, complete, and fair opportunity to litigate any issue upon which his rights depend." Bahler, 474 P.2d at 332. As Professor Moore has explained, courts discussing the "full and fair opportunity" concept have typically cited procedural limitations to the full presentation of evidence as the kind of circumstance that would thwart a full and fair opportunity to litigate. See 1B James Wm. Moore et al., Moore's Federal Practice ¶ .441[3.-3] at 736. Logically, however, such circumstances are presumably incapable of occurring in subsequent federal actions.

> In the federal courts, of course, successive suits in different districts would be governed by the same basic procedural rules. There remains the possibility that the unavailability of compulsory process in a particular district may have hampered the presentation of evidence on a particular issue, but with all the circumstances in which it

can be said that the parties to suits in the federal courts lack a "full and fair opportunity" to present their claims and defenses are probably very limited.

Id. at 736-37 (footnote omitted).

There is no suggestion by any of the parties that Raytech was restricted procedurally from presenting its full case before Judge Panner. Nor can the Court conclude that any of the circumstances cited in section 28 of the Restatement warrant against application of the doctrine.[17] Those excep-

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17 Section 28 cites the following exceptions to the general rule of issue preclusion:

(1) where the party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action; or

(2) where the issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or

(3) where a new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two court or by factors relating to the allocation of jurisdiction between them; or

(continued...)

tions cited as 5(b) and 5(c) are further discussed in the Court's consideration of the general fairness considerations raised in Parklane Hosiery.

4. Issue Necessary to Support Valid, Final Judgment on the Merits

The Court need not belabor this question. In finding against Raytech, Judge Panner held that Raytech is a successor in liability to Raymark Industries. Clearly, that holding

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17(...continued)

(4) where the party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to its adversary; or the adversary has a significantly heavier burden than it had in the first action; or

(5) where there is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of its adversary, or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

Restatement (Second) of Judgments § 28.

was necessary to the judgment rendered, and not merely an incidental or collateral determination.

The Court turns then to the question of whether resolution of that issue resulted in a "final judgment" for collateral estoppel purposes. To be "final" for such purposes, "a decision need not possess 'finality' in the sense of 28 U.S.C. § 1291. A 'final judgment' for purposes of collateral estoppel can be any prior adjudication of an issue in another action that is determined to be 'sufficiently firm' to be accorded conclusive effect." Luben Indus., Inc. v. United States, 707 F.2d 1037, 1040 (9th Cir. 1983) (citing Miller Brewing Co. v. Jos. Schlitz Brewing Co., 605 F.2d 990, 996 (7th Cir. 1979), cert denied, 444 U.S. 1102 (1980); and Restatement (Second) Judgments § 13 (1982)). The Court finds no cause to question the finality of Judge Panner's decision. An explicitly labeled "judgment" incorporating the December 23, 1988 decision on the successor liability question was filed by Judge Panner on January 26, 1989, wherein he directed the Clerk of the Court to enter final judgment in the case. See Exh. K to Mutnick Affidavit; see also Reed Affid. at 5 ("[o]n December 23, 1988, Judge Panner issued his opinion in Schmoll. The Judgment subsequently entered in the case"). Even absent such a procedurally definite judgment, the Court would find Judge Panner's decision sufficiently firm to warrant affording it such conclusive weight. As the authors of the Restatement suggest, a prior decision may be considered sufficiently firm to be afforded preclusive effect even in the absence of a final judgment. "[T]hat the parties were fully heard, that the court supported its decision with a reasoned opinion, that the decision was subject to appeal or was in fact reviewed on appeal, are factors supporting the conclusion that the decision is final for the purposes of preclusion." Restatement (Second) of Judgments § 13 cmt. g. All the enumerated factors

supporting the finality of the judgment were present in the Schmoll case.[18]

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18 This conclusion as to the finality of the decision is not altered by the pendency of the Schmoll appeal. Under either federal or Oregon state law, the pendency of an appeal is irrelevant to the finality of a judgment for collateral estoppel purposes. See Miller v. Garrett, 695 F. Supp. 740, 747 n.4 (S.D.N.Y. 1988); Cerbone v. County of Westchester, 508 F. Supp. 780, 785 (S.D.N.Y. 1981) ("both the federal and the New York rules hold that, unless de novo review is permitted on appeal, the pendency of an appeal does not suspend the collateral estoppel effect of an otherwise final judgment") (footnote and citations omitted); Ron Tonkin Gran Turismo, Inc. v. Wakehouse Motors, Inc., 46 Or. App. 199, ___, 611 P.2d 658, 662 (1980) ("[t]he pendency of an appeal does, in some jurisdictions, prevent a judgment from operating as res judicata or collateral estoppel. The law in Oregon is to the contray [sic]. . . . The rule in federal court is the same as that in Oregon") (citations omitted); cf. United States v. International Bhd. of Teamsters, 905 F.2d 610, 621 (2d Cir. 1990) ("[w]e have recently pointed out that the pendency of a criminal appeal generally 'does not deprive a judgment of its preclusive effect'") (citations omitted). See generally Restatement (Second) of Judgments § 13 cmt. f (commending as "the better view" that position that "a judgment otherwise final remains so despite the taking of an appeal").

(continued...)

5. General Fairness Concerns

Notwithstanding the fact that all the requisites for affording collateral estoppel effect to the Schmoll decision, at least with respect to Count I, are met in the case at bar, this Court has broad discretion under both federal and Oregon state law to protect against any unfairness that might arise from its application in an offensive capacity. See Parklane Hosiery, 439 U.S. at 331; Bahler, 474 P.2d at 338. In Parklane Hoisery, the Supreme Court adopted a general rule of fairness, providing that "in cases where a plaintiff could easily have joined in the earlier action or where, for the reasons discussed above or for other reasons, the application of offensive collateral estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel." Parklane Hosiery, 439 U.S. at 331. As examples of instances in which application of the doctrine might work unfair results, the Court cited the following: 1) where a defendant in the first action is sued for small or nominal damages, and has little incentive to defend vigorous-

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18(...continued)

In spite of Judge Panner's request that the Ninth Circuit expedite any appeal from his decision, see Exh. K to Mutnick Affidavit at 2, the Court of Appeals has stayed the pending appeal at Raytech's request. See Exhs. A and B to Oregon Claimants' Mem. in Supp. of Motion to Intervene and Participate (filed Oct. 15, 1990) (copies of request of Raytech to continue the stay and a Ninth Circuit order granting such request). This Court has been informed by the Clerk's Office of the Ninth Circuit that pursuant to a July 16, 1991 Order, the stay has been extended to September 30, 1991.

ly, particularly where future suits are not foreseeable; 2) where the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant; 3) where the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result; or 4) where a plaintiff could easily have joined in the earlier action. The first example cited is the only one arguably at issue in this case.

Conceding solely for the sake of argument that collateral estoppel applies to this action, Raytech argues that it would nonetheless be "fundamentally unfair" for the Court to allow application of the doctrine in this case because it, Raytech, expended such little effort in litigating the Schmoll case. In so contending, however, Raytech only undermines its own cause. Indeed, were it not for the formidable stakes involved, the Court would find almost amusing, if not incredible, Raytech's ill-advised suggestion to one district court that another district court Ruling was an unimportant one. Raytech states, "the [Creditors'] Committee and the Defendants are trying to make a mountain out of a mole hill. Schmoll in fact was merely one case that involved a very small amount of money." Raytech Supp. Mem. Brief at 10. Elsewhere, Raytech submits that

> [a]t the time it litigated Schmoll, Raytech was named in a relatively small number of cases outside of Oregon, and Raymark Industries, Inc., was in a position to perform fully its contractual indemnity obligations. Moreover, Raytech's potential monetary liability to Mr. Schmoll was extremely small. Under these circumstances, Raytech consented to a bench trial under Oregon law. Raytech could not have foreseen that the Oregon court would go out of its

> way to rewrite the controlling law. Nor could Raytech have foreseen that its corporate existence ultimately could depend upon the outcome of an otherwise insignificant case.

Id. at 6 (emphasis added).

The record only serves to belie Raytech's position, and suggests instead that Raytech was well aware of the stakes involved in Schmoll. According to an affidavit of Jeffrey S. Mutnick, one of Mr. Schmoll's attorneys, "Raytech filed exhibit lists, each of which had more than 100 exhibits listed, and witness statements which were indicative of their desire to litigate as a factual and legal issue the responsibility of Raytech as the successor to Raymark." Mutnick Affid. at 1. Mr. Mutnick further states that William Reed, Raytech's counsel, was retained "solely for the purpose of litigating the issue of Raytech's responsibility for Raymark's tortious acts." Id. at 2 (emphasis added). In an extraordinarily telling passage of Mr. Mutnick's affidavit, he states that

> [i]t was my belief at the time this agreement [to bifurcate the successor liability issue] was reached that the purpose of this litigation was to resolve fully and finally the issue of Raytech's successor liability for Raymark. . . . It is my belief, based upon these discussion, that both Raytech and our offices fully intended Judge Panner's decision and that of the Ninth Circuit to be dispositive of the successor liability issues. It was obvious, based upon the facts and circumstances surrounding this issue, that either party would be collaterally estopped from relitigating the issue after it was finally decided by either Judge Panner or the Ninth Circuit.
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> . . . .

> During our discussions, it was acknowledged by Mr. Reed and other Raytech representatives that this issue could be presented in other jurisdictions where litigation was pending against Raytech but that resolving it at that time in Oregon, before Judge Panner, would be appropriate and would be the most expeditious manner of affecting all litigation pending then against Raytech. . . . [I]t was repeatedly acknowledged by Mr. Reed that the facts and documents regarding this issue would not vary from jurisdiction to jurisdiction and that the manner in which the issue would be litigated in Oregon would be no different than the manner in which it would be litigated by Raytech in any other jurisdiction. . . . It was my intention, and I believe the intention of Raytech's counsel, that any decision of Judge Panner, and ultimately by the Ninth Circuit, provide a basis for collaterally estopping further litigation of this issue in this jurisdiction and would in all likelihood provide a basis for similar decisions in other jurisdictions.

Id. at 2-4

According to both Mr. Mutnick and Judge Panner, the parties submitted thousands of pages of documents and deposition transcripts for the Court's consideration regarding the successor liability issue. Schmoll, 703 F. Supp. at 869; Mutnick Affid. at 3. Raytech filed one exhaustive 68-page memorandum of law on the issue, see Exh. A to Mutnick Affid., having presumably received leave from the Court to file a brief in excess of the local 35-page limit. See id. at Exh. C. In response to an order from the Court for supplemental briefing, Raytech filed an additional supplemental memorandum brief, numbering five pages in length. See

Exh. E to Mutnick Affid. As Mr. Mutnick explains, that such tremendous efforts were expended by both sides, notwithstanding the fact that Mr. Schmoll's settlement with Raymark and subsequent judgment against Raytech resulted in his being able to collect only a few hundred dollars once the previous settlements were offset against that judgment, demonstrates "that the parties' manner of resolving the successor liability issue was more important than the case itself in many ways." Mutnick Affid. at 4.

Mr. Mutnick's account does not stand uncorroborated. The Court finds most significant, and certainly most damaging to Raytech's position, the wording of Judge Panner's January 26, 1989 filed Judgment, which was stipulated to, "as to form", by William Reed, counsel for Raytech.[19] States Judge Panner, "[t]he Court acknowledges that the issues raised by defendant Raytech Corp.'s liability are of great importance to the administration of justice, because the Court's decision could impact on tens of thousands of asbestos cases across the country. Therefore, the Court requests the Court of Appeals to expedite any appeal herefrom." Exh. K to Mutnick Affid. at 2, ¶ 5.[20] As his

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19 In his filed affidavit with this Court, Mr. Reed states that "[i]n approving the form of the Judgment in Schmoll, I did not intend to bind Raytech in any other case."

20 That the civil minutes of a pretrial conference with Judge Panner state that "[p]arties agree that court's decision on derivative liability shall apply to all three cases: Schmoll, Fischer & Merritt" (the latter (continued...)

Judgment leaves plain, Judge Panner understood the scope of his judgment to be beyond the three cases before him, and indeed, to be beyond any actions brought in Oregon.

The Court finds Mr. Reed's affidavit of little help in the resolution of this matter. Whether Raytech did or did not stipulate to any collateral estoppel effect of the Schmoll decision is of relatively small matter to the Court's own consideration of whether, as a legal issue, the requisites of the collateral estoppel doctrine have been satisfied. As the Creditors' Committee correctly observes, "[a]ctual agreement as to future collateral estoppel effect is unnecessary, and its absence is irrelevant." Creditors' Comm. Brief at 10 n.6.[21]

Additionally, the Court questions the assertion that "after extensive briefing," the United States District Court for the District of Hawaii denied the efforts of plaintiffs in a case before it to afford collateral estoppel effect to Schmoll. Reed Affid. at 7-8. Despite having had ample opportunity to

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20(...continued)
two being mesothelioma cases also filed against Raytech and Raymark Industries) in no way works a limitation of the scope of Judge Panner's decision to those three matters.

21 Likewise, an alleged agreement entered into between the parties regarding the collateral estoppel effect of the Schmoll decision, and referenced in Mr. Mutnick's affidavit, is, by its own terms, meaningless to the Court. See Mutnick Affid. at 7 (stating that the agreement provided that its terms were "confidential and shall not be disclosed to any third party").

provide the Court with a copy of an order or ruling to such effect, Mr. Reed has not submitted any such copy, leaving all the more conspicuous the failure to explain the Hawaii court's rationale. Similarly, the Court has accorded no weight to Exhibit G of Mr. Reed's affidavit, a "proposed stipulation" drafted by Mr. Reed which he attests was, "to the best of [his] knowledge," filed in the "Group 9 Cases." Id. at 7.[22] The affidavit is noteworthy, as cited by the Creditors' Committee, for the fact that Mr. Reed does not deny that he vigorously litigated the successorship issue for Raytech in Schmoll.

Having assessed the above, the Court concludes that there are no general fairness concerns that argue against the application of offensive collateral estoppel in this case, at least with respect to the successor liability theory advanced in count I. All other requisites for the application of collateral estoppel having been satisfied, this Court finds Raytech collaterally estopped from proceeding with count I of its complaint. This conclusion is entirely consistent with, and indeed, serves to ratify, the purposes of the doctrine of collateral estoppel. "A fundamental precept of common-law adjudication is that an issue once determined by a competent court is conclusive." Montana v. United States, 440 U.S. 147, 153 (1979). This precept is furthered by application of the collateral estoppel doctrine, with its dual purposes of "protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litiga-

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22 The "Group 9" cases were a group of six cases naming Raymark and Raytech as defendants, and set for trial in February 1989 before Judge Panner. See id. at 6.

tion." Parklane, 439 U.S. at 326. As the Supreme Court further explained in Montana, 440 U.S. at 153-54, "[t]o preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." See also Restatement (Second) of Judgments § 29 cmt. f ("[g]iving a prior determination of an issue conclusive effect in subsequent litigation is justified not merely as avoiding further costs of litigation but also by underlying confidence that the result reached is substantially correct").

Although not a basis for the results here reached, the Court is constrained to add that the damage caused by any needless relitigation of the ground already well-covered by Judge Panner would be particularly heightened in the case at bar. Raytech's adversary proceeding is a declaratory judgment action, the outcome of which will shape tens of thousands of asbestos personal injury suits across the country. The litigants in these suits are already, in a very real sense, dual victims -- alleged victims on the one hand of the harm wrought by asbestos, and real victims on the other of the legal morass that has, to date, largely characterized much of the course of asbestos litigation in this nation.

CONCLUSION

For the reasons set forth above, count I of Raytech's complaint is hereby ORDERED dismissed. Further, in view of the reasoning contained herein, the parties are ORDERED to brief the following questions: 1) whether, for collateral purposes, the "purposes of avoiding liability" issue considered and resolved by Judge Panner in Schmoll is a uniform consideration under alter ego and/or fraudulent conveyance

theories in jurisdictions across the country as well, such that it may be said that there is no "substantial difference" between the standards; and 2) if there is no such "substantial difference", whether the other requirements of collateral estoppel have been satisfied, including the general fairness requirements cited in Parklane Hosiery. Such briefs shall be filed by September 20, 1991.

SO ORDERED.

Dated at Bridgeport, Connecticut this 28th day of August, 1991.

T. F. Gilroy Daly, U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

RAYTECH CORPORATION,	:	
	:	
Plaintiff,	:	Civ. No.
v.	:	B-89-623 (TFGD)
	:	
EARL WHITE, YVONNE WHITE, PASQUALE DICINTIO, MARIE DICINTIO, LARRY BENZIE, Executor of the Estate of Edward Benzie, EUGENE KLINGENBERGER, MARGIE KLINGENBERGER, JOHN DOE and all others similarly situated,	:	
	:	Entry date
Defendants.	:	February 24, 1992

RULING ON MOTION FOR RECONSIDERATION

On August 28, 1991, this Court ruled that in view of the Honorable Owen M. Panner's decision in Schmoll v. ACandS, Inc. 703 F. Supp. 868 (D. Or. 1988), Raytech Corporation ("Raytech"), the plaintiff in this declaratory judgment action, was collaterally estopped from litigating the successor liability issue comprising the first count of its

complaint. Presently pending before the Court is Raytech's motion for reconsideration of that Ruling.[1]

Raytech's motion does not merit serious consideration. Although the motion is granted to the extent that the Court has revisited its analysis of the collateral estoppel question, the Court adheres, upon reconsideration, to its Ruling for the reasons stated therein and for the reasons set forth in the Creditors' Committee's response to Raytech's motion. One observation bears brief mention: to the extent that Raytech's motion is at least as much an assault on the Schmoll decision as it is an assault on this Court's Ruling, plaintiff is reminded of the principle that collateral estoppel "protects wrong decisions as fully as right ones." Friarton Estates Corp. v. City of New York, 681 F.2d 150, 158 (2d Cir. 1982). Whether the Schmoll decision was correctly decided is a question that obviously awaits the Ninth Circuit's attention.

SO ORDERED.

Dated at Bridgeport, Connecticut this 20th day of February, 1992.

T.F. Gilroy Daly, U.S.D.J.

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1 Also pending before the Court are the parties' supplemental briefs on the issue of the collateral estoppel effect of the Schmoll decision on counts II and III of Raytech's complaint. In view of the transfer of this case on this same date to the Eastern District of Pennsylvania, these additional matters are respectfully referred to that Court.

RAYMOND A. SCHMOLL,
Plaintiff-Appellee,

v.

ACANDS, INC., a Pennsylvania Corporation, et al.,
Defendants,

and

RAYTECH CORPORATION,
Defendant-Appellant.

RAYMOND A. SCHMOLL,
Plaintiff-Appellee,

v.

ACANDS, INC., a Pennsylvania Corporation, et al.,
Defendants,

and

RAYTECH CORPORATION,
Defendant-Appellant.

Nos. 89-35101, 89-35168

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Sept. 15, 1992.
Decided Oct. 26, 1992.

Appeal from the United States District Court for the District of Oregon; Owen M. Panner, Chief Judge.

Before: BEEZER, NOONAN, and TROTT, Circuit Judges.

ORDER

Under Oregon law, creditors have priority over shareholders in all of the future earnings of an insolvent corporation. We have reviewed the record in No. 89-35168 and we affirm the district court's judgment on the grounds stated in its opinion. *Schmoll v. ACandS, Inc.*, 703 F.Supp. 868 (D.Or.1988).

We dismiss Raytech's appeal of an interlocutory order in No. 89-35101.

RAYMOND A. SCHMOLL,

Plaintiff,

ACANDS, INC., a Pennsylvania Corporation, et al.,

Defendants.

Civ. No. 86-1313-PA.

United States District Court,
D. Oregon.

Dec. 23, 1988.

OPINION

PANNER, Chief Judge.

Plaintiff Raymond Schmoll brings this products liability action against Raymark Industries Inc. and Raytech Corporation (Raytech). The issue is whether Raytech is liable as a successor for Raymark Industries' production, sale and distribution of products containing asbestos. I find that Raytech is a successor in liability to Raymark Industries.

Plaintiff seeks damages against multiple defendants, including Raymark Industries and Raytech, for injuries allegedly caused by inhaling asbestos dust from products manufactured or sold by defendants. The parties stipulated to bifurcation of the proceedings and agreed to submit to the court the question whether Raytech is a successor in liability to Raymark Industries. Plaintiff and Raytech have submitted thousands of pages of documents and deposition transcripts, covering a variety of corporate transactions from 1982 through 1988. The parties agreed that I would base my decision upon the briefs, and depositions and exhibits cited in the briefs.

Background

Raymark Industries manufactured and distributed energy absorption and transmission products, including asbestos and asbestos-containing products. Since the early 1970's, Raymark Industries[1] has been named in an ever- increasing number of asbestos related personal injury lawsuits. By June 26, 1988, Raymark Industries had been named as a defendant in more than 68,000 cases. Approximately 1,000 new cases are filed each month.

Raymark Industries has suffered severe financial declines as a result of the asbestos litigation. In 1981, Raymark Corporation[2] had a net worth of $112.4 million. By 1985, the reported net worth of the company had dropped to $3.6 million. Between 1982 and 1988, Raymark Corporation reorganized its corporate structure in response to this financial decline. Raymark told its shareholders that the corporate restructuring would:

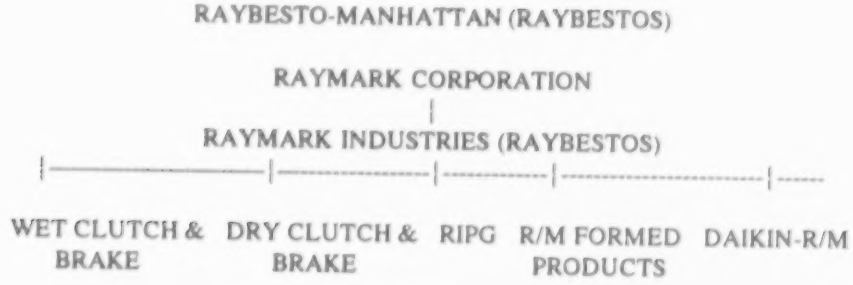
> permit the Company to gain access to sources of capital and borrowed funds and thereby finance the acquisition and operation of new businesses unrelated to Raymark Corporation in a corporate structure that should not subject the holding company or such acquired businesses to asbestos-related liabilities of Raymark Corporation.

The corporate restructuring involved a complex series of transactions that transformed Raybestos-Manhattan into Raymark

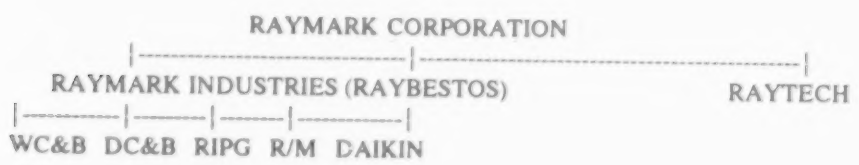
1 Until 1982 Raymark Industries was called Raybestos-Manhattan, Inc. The name was changed as part of the corporate reorganization in which Raymark Corporation became the parent and sole shareholder of Raymark Industries.

2 The corporate structure and reorganization will be discussed in detail at a later point. However, for clarification, Raymark Corporation was a holding company and operated through its subsidiary, Raymark Industries.

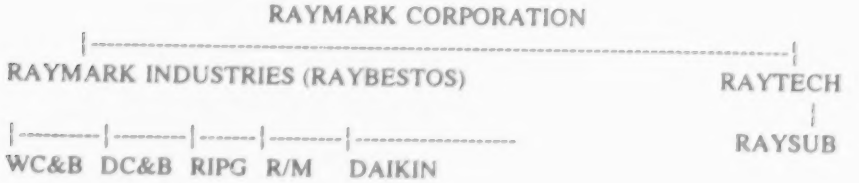
Industries and Raytech. The steps of this restructuring are diagrammed and described below.



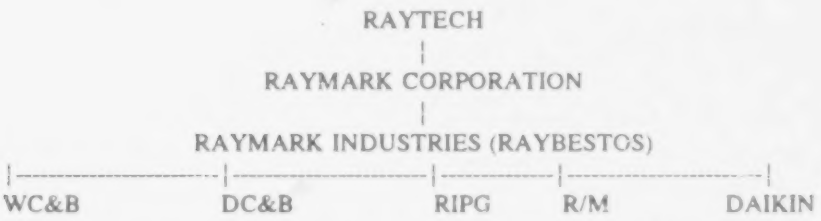
STEP 1: Raybestos-Manhattan (Raybestos), originally organized as a New Jersey corporation in 1929, was reorganized as a Connecticut corporation in 1976. In 1982, Raybestos-Manhattan changed its name to Raymark Industries and created Raymark Corporation as a holding company for Raymark Industries. Raymark Corporation's only asset was the stock of Raymark Industries. In 1985, Raymark Industries' assets included two operating divisions, Wet Clutch & Brake (WC & B) and Dry Clutch & Brake (DC & B); the stock of a German subsidiary, Raybestos Industrie--Produkte G.m.b.H. (RIPG); the stock of a shell corporation, R/M Formed Products; and a 50% interest in a foreign joint venture, Daiken--R/M.



STEP 2: In June 1986, Raymark Corporation created Raytech as a wholly owned subsidiary.



STEP 3: Raytech then created Raysub as a wholly owned subsidiary. Raytech and Raysub were created solely to carry out the merger described in the next step.

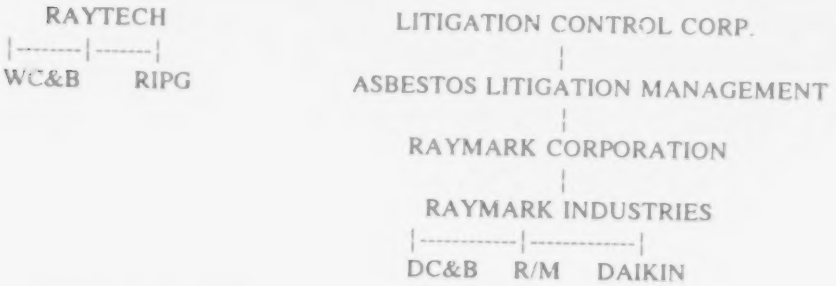


STEP 4: In October 1986, Raymark Corporation merged into Raysub, with Raymark Corporation surviving as a wholly-owned subsidiary of Raytech. In this merger, each outstanding share of Raymark common stock was converted into one share of Raytech stock. Raytech, designated the "holding company," was entirely owned by the former shareholders of Raymark Corporation. As a result of this merger, Raytech, the parent of Raysub, became the parent of Raymark Corporation. Raytech then owned 100 percent of the stock of Raymark Corporation, which owned 100 percent of the stock of Raymark Industries.

STEP 5: In 1987, Raytech purchased Raymark Industries' two most profitable assets, the Wet Clutch and Brake Division and RIPG stock. Raytech purchased the Wet Clutch and Brake Division for $76.9 million. Payment consisted of approximately $15 million in cash, $10 million worth of Raytech stock at closing with another

$6 million in stock to be transferred later,[3] and $46 million in unsecured notes. The Wet Clutch and Brake Division, the largest of Raymark Industries' business operations, had significant profit potential.[4] Furthermore, the asbestos claims against Raymark Industries did not arise from the Wet Clutch and Brake Division.[5]

Raytech also purchased the RIPG stock owned by Raymark Industries for $8.2 million. RIPG does not manufacture or sell its asbestos products in the United States and has never been named in asbestos-related litigation. Terms of the sale included a cash payment of $3.9 million, with the balance financed by an unsecured note.



STEP 6: In 1988, Raytech sold Raymark Corporation, and thus Raymark Industries, to Asbestos Litigation Management (ALM) for

3 Though stock transferred to Raymark had an apparent market value of $10 million, it is unlikely that Raymark could have sold those shares for anything approaching that value. Any attempt by Raymark to market large blocks of these shares would have had a devastating effect on the price of Raytech shares. Dr. Albert Fitzpatrick, plaintiff's business expert, stated that Raymark probably would have had to accept a 90% discount in order to sell these shares as a block.

4 Of the portfolio of businesses owned by Raymark Industries, the Wet Clutch and Brake division was the best current performer in 1986.

5 The Wet Clutch division purchased asbestos paper as a component of products but the asbestos paper operated in an oil-immersed environment.

$1 million. ALM paid $50,000 in cash and a $950,000 unsecured promissory note for all Raymark Corporation's assets and liabilities.

ALM is a wholly owned subsidiary of Litigation Control Corporation (LCC), whose business includes claims processing, document control and retention, and other services to companies involved in complex litigation. ALM serves only companies defending asbestos litigation. ALM now owns the stock of Raymark Corporation, whose only asset is Raymark Industries' stock.

As a result of this involved corporate restructuring, Raytech now owns WC & B and RIPG, the two historically lucrative businesses of Raymark Industries, without the drain of asbestos-related litigation. By selling the stock of Raymark Corporation, Raytech was able to dispose of a subsidiary whose asbestos-related expenses had decreased its earnings by $8.6 million during the first quarter of 1988.

Discussion

In this action, plaintiff seeks to hold Raytech liable for Raymark Industries' production, sale, and distribution of asbestos-containing products. Plaintiff contends that, for purposes of liability, Raytech and Raymark Industries are the same corporate entity.[6] Defendant Raytech argues that as an innocent, successor corporation, it should not be liable for the acts or omissions of its predecessors.

I have found no reported case quite like this case. This is not surprising. Plaintiff's business expert testified that he thought this case involves the first corporate restructuring of its kind. Raymark Corporation told its shareholders that the transformation was "novel." Defendants and their counsel have engineered an

6 This is a diversity action. The parties agree that Oregon law applies because the defendants' alleged tortious acts took place in Oregon.

elaborate, apparently unique transfer of corporate assets, carefully preserving the appearance of an arms-length transaction between separate corporations.

[1] As a general rule, when a corporation purchases all or most of the assets of another corporation, the purchasing corporation does not assume the debts and liabilities of the selling corporation. *Erickson v. Grande Ronde Lumber Co.*, 162 Or. 556, 568, 92 P.2d 170, 174, 94 P.2d 139 (1939). However, the purchasing corporation may be responsible for the selling corporation's obligations if (1) the purchasing corporation expressly or impliedly agrees to assume those liabilities; (2) the transaction amounts to a consolidation or merger of the corporations; (3) the purchasing corporation is a continuation of the selling corporation; or (4) the corporations enter the transaction to escape liability. *Id.*; *see also Dairy Coop. Ass'n v. Brandes Creamery*, 147 Or. 488, 496, 30 P.2d 338, 341 (1934) (successor corporation liable for contractual debt of its predecessor because successor formed solely to escape liability); *Peterson v. Harville*, 445 F.Supp. 16, 24 (D.Or.1977) (applying Oregon law), *aff'd*, 623 F.2d 611 (9th Cir.1980).

Oregon courts reject transfers of corporate assets designed to escape liability. For example, in *Dairy Coop.*, a cooperative sought to enforce an exclusive marketing contract against the corporate successor of Brandes Creamery, a milk distributor. Brandes Creamery had dissolved, and a new corporation, Brandes Creamery, Inc., was formed in its place. The court held Brandes Creamery, Inc. liable for Brandes Creamery's contracts, noting that:

> the dissolution of Brandes Creamery and the organization of Brandes Creamery, Inc., had but one purpose and that was to avoid the contractual liability of Brandes Creamery arising from the contract in suit. In this state of the record, equity will look through the form at the substance.

147 Or. at 496, 30 P.2d at 341.

The Raytech-Raymark Industries asset transfer does not precisely parallel the transaction rejected in *Dairy Coop.* However, *Dairy Coop.* highlights two important principles of Oregon law that are directly applicable. First, that case shows the Oregon courts are more concerned with the substance of a transaction than its particular form. Second, Oregon law rejects corporate restructuring carried out to escape liability.

Peterson also illustrates those principles. In *Peterson*, the plaintiffs loaned $100,000 to Oceanic Inc., a corporation whose principal asset was a land sale contract. Oceanic Inc. assigned its interest in the land sale contract to its president, who immediately assigned that interest to Oceanic Development, a newly created corporation. In return, the precident assumed Oceanic Inc.'s liabilities. However, because the president was already personally liable for Oceanic Inc.'s debts, the court found that "[t]he net effect of the overall transfer of interest in the land was to strip [Oceanic Inc.] of a valuable asset ... leaving [Oceanic Inc.] and the creditors of [Oceanic Inc.] with nothing." 445 F.Supp. at 25. Invoking its equitable power, the court held Oceanic Development, the successor corporation, liable for Oceanic Inc.'s debts.

The result of the asset transfer in this case is similar to that in *Peterson*. Raymark Industries had valuable assets, RIPG and Wet Clutch & Brake. It conveyed these assets to Raytech, which was owned by Raymark Industries' former shareholders. This transaction left Raymark Industries with staggering asbestos liabilities, unprofitable operations, unsecured notes, and stock which could not be sold in large blocks without a deep discount.

Present and future asbestos tort claimants, as Raymark Industries' potential creditors, were likewise left with little in the transaction. The money Raytech paid for Raymark Industries' profit-generating assets will not adequately compensate present and future claimants. If Raytech escapes liability for Raymark Industries' torts, these creditors will no longer have access to Raymark Industries' valuable assets or to the potential stream of profits generated by these assets.

In the present case, the context of the corporate restructuring and the participants' statements show that the elaborate transfer of assets was designed to escape liability. Raymark Industries has experienced severe financial problems because of asbestos litigation. By April 1, 1988, nearly 34,000 asbestos related personal injury cases were pending against Raymark Industries. These claims exceed $33 billion. Trying cases to verdict has cost an average of $59,000. Raymark Industries has been assessed more than $75,000,000 in punitive damages from asbestos litigation.[7] Raymark Industries has already exhausted approximately 71% of its almost $400 million in insurance coverage.

In response to Raymark Corporation's financial difficulties, Craig Smith[8] and other officers and directors, with the advice of counsel, developed the sophisticated corporate restructuring scheme. The New York law firm of Debevoise & Plimpton advised Raytech's board of directors that:

> It should be possible under existing case law for Raytech to acquire assets or businesses of Raymark without thereby subjecting Raytech or such acquired assets or businesses to liability for the asbestos-related claims against Raymark under

7 A consolidated case against Raymark Industries involving more than 2,200 plaintiffs is currently pending in the United States District Court for the Eastern District of Texas. The verdict in that case could far exceed Raymark Industries' insurance policy limits.

8 From 1980 to 1985, Craig Smith was employed by Raymark Corporation as a division president. In 1985, Smith became the President and Chief Executive Officer of Raymark Corporation. Presently Smith is the President and Chief Executive Officer of Raytech.

Smith established Litigation Control Corporation on August 27, 1987. Its purpose is to provide services to corporations which have high volumes of litigation particularly in the field of product liability and toxic tort. Litigation Control Corporation currently holds 100 percent of the shares of Raymark Corporation. Craig Smith owns 45 percent of the shares of LCC and his son, Bradley Smith, owns another 15 percent of the shares of LCC.

> the doctrines of successor liability, piercing the corporate veil or fraudulent conveyance....

Raymark Corporation's 1985 annual report stated that the company's long term strategy was:

> to protect and enhance shareholder investment, to maximize the amounts available for deserving asbestos-injured claimants[9] and to limit exposure for asbestos claims only to businesses currently threatened, thus enabling our other businesses and any new business opportunities to grow, unshadowed by the cloud of asbestos liability.

Another purpose of the corporate restructuring was:

> to gain access to new sources of capital and borrowed funds which could be used to finance the acquisition and operation of new businesses in a corporate restructure that should not subject Raytech or such acquired businesses to the asbestos related liabilities of Raymark.

John Kutzler,[10] who held various high-level positions at both Raytech and Raymark Corporation, stated that the "intention was to remove an asset through different ownership from the exposure of the asbestos litigation." Craig Smith testified that the restructuring was designed to insulate Raytech from Raymark's liabilities.

9 Raymark Industries' 1988 Settlement Guidelines provides a maximum payment of $452. In a recent case involving clear asbestos liability and death from mesothelioma, Raymark Industries offered nothing. The jury returned a verdict of $1.7 million in compensatory damages against Raymark Industries. *Sawyer v. Raymark Industries, Inc.*, No. 87-542 (D.Haw. Dec. 6, 1988).

10 In 1982, John Kutzler was a treasurer of Raybestos Manhattan. In 1984, Kutzler became a Board member of Raymark Industries, Inc.

[2] I find that, although the corporate restructuring meets the technical formalities of corporate form, it was designed with the improper purpose of escaping asbestos-related liabilities. [FN11] Raymark Corporation changed from the parent of Raymark Industries to the subsidiary of Raytech to the subsidiary of ALM. Raytech purchased Raymark Corporation's two valuable assets and then sold the remainder to ALM for $1 million. It is inconceivable that in an arms- length corporate transaction, a buyer would have purchased an entity so lacking in assets and laden with liabilities.[11]

There is no just reason to respect the integrity of these transactions. Raymark Industries made substantial profits from the production of asbestos-containing products. Raymark Industries should not be allowed to avoid liability by transferring its profitable assets leaving no more than a corporate shell unable to satisfy its asbestos-related obligations.

This case presents serious equitable considerations. At least 21 million American workers have been directly exposed to significant amounts of asbestos at the work place since 1940 and millions more have been indirectly exposed. R. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 Fordham L.Rev. 37, 37 n. 1 (1983). Tens of thousands of people become ill or die from asbestos-related diseases every year. Note, *Who Will Compensate the Victims of Asbestos-Related Diseases? Manville's Chapter 11 Fuels the Fire*,

11 Plaintiff notes that if he were attempting to set aside the transactions, rather than hold Raytech responsible for Raymark Industries' torts, the court could hold as a matter of law that the transactions constituted fraudulent conveyances under the Uniform Fraudulent Transfer Act, Or.Rev.Stat. § 95.200-310.

14 Envtl.L. 465, 466-67 (1984). Asbestos-related lawsuits are filed in corresponding numbers.[12]

It is ironic that, while Raymark Industries prides itself for not following Johns-Manville Corporation's (Manville) lead by filing bankruptcy, Raymark is in effect attempting a bankruptcy-like reorganization without affording creditors the protections of formal bankruptcy. In December 1986, the United States Bankruptcy Court for the Southern District of New York confirmed a Plan of Reorganization of Manville. The Plan created a personal injury trust of $3 billion to cover all of Manville's present and future, known and unknown asbestos injury liabilities. *See In re Johns-Manville Corp.*, First Amended Disclosure Statement, Second Amended and Restated Plan of Reorganization and Related Documents, Nos. 82 B 11656, 82 B 11657, 82 B 11660, 82 B 11665--11673, 82 B 11675, 82 B 11676 (Bankr.S.D.N.Y., Aug. 22, 1986).

The success or failure of Raymark Corporation's attempts to escape asbestos liability will provide direction to other companies seeking to avoid such responsibility. Upholding the integrity of such transactions would unjustly elevate form over substance.

Conclusion

I find that Raytech is a successor in liability to Raymark Industries, for Raymark Industries' production, sale and distribution of products containing asbestos. Therefore, Raytech is responsible for Raymark's strict liability torts. This opinion is my findings of fact and conclusions of law. F.R.Civ.P. 52(a).

12 Through April 1, 1988, Raymark Industries has been named in 68,057 separate actions involving 84,724 individual plaintiffs. In 1988, 1,209 cases have been filed per month. Raymark Industries projects additional filings through 1997 of approximately 61,200 cases. More than 165 companies are involved in the asbestos litigation across the nation. Asbestos Litig.Rep. 4667-70 (Feb. 26, 1982).